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In The

Supreme Court of the United States

October Term, 1998

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GREATER BAY AREA ASSOCIATION OF PLUMBING AND MECHANICAL CONTRACTORS,

Petitioner,

v.

MECHANICAL CONTRACTORS ASSOCIATION OF NORTHERN CALIFORNIA,

Respondent.

◆

On Petition For A Writ Of Certiorari
To The California Court Of Appeal,
First Appellate District, Division Five

◆

PETITION FOR A WRIT OF CERTIORARI

◆

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QUESTIONS PRESENTED

The issues presented by this appeal are as follows:

1. Whether a court may eschew and override agreed-upon provisions in collective bargaining agreements ("CBAs") prohibiting oral or implied modifications of any kind whatsoever by ruling that the CBAs could nevertheless be orally modified; and

2. Whether courts and the National Labor Relations Board ("the Board") have concurrent jurisdiction over a defense – that a side agreement to modify a CBA is illegal and void for violating notice requirements of section 8(d) of the National Labor Relations Act ("NLRA") – where the underlying action has been brought in state court rather than before the Board.

PARTIES

The Parties to this proceeding are those named in the Caption of this case. There exist no other parent companies or nonwholly owned subsidiaries related to this action.

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PETITION FOR A WRIT OF CERTIORARI

The Plumbing-Heating-Cooling Contractors Association of the Greater Bay Area, Inc. (named herein as Greater Bay Area Association of Plumbing and Mechanical Contractors and hereinafter "GBA" or "Petitioner") hereby respectfully petitions this Court for a writ of certiorari to review the judgment of the California Court of Appeal, First Appellate District, Division Five in this case.

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OPINIONS AND ORDERS BELOW

The Order of the California Supreme Court is unpublished and reprinted in full at Appendix B ("App. B").

The decision of the California Court of Appeal, First Appellate District, Division Five is partially published at 66 Cal. App. 4th 672 (1998) and reprinted in full at Appendix A ("App. A").

The order of the Trial Court, granting Petitioner's Motion in Limine (essentially dismissing the case) is unreported. It is reprinted here in full at Appendix C ("App. C").

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JURISDICTION

The California Court of Appeal, First Appellate District, Division Five issued its decision in this case on September 8, 1998. App. A. Review of this decision was denied by the California Supreme Court on December 16, 1998. App. B.

This Court has jurisdiction to review this case under 28 U.S.C. § 1257. This petition has been filed within the time limits set forth in Supreme Court Rule 13(i).

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STATUTORY PROVISIONS INVOLVED

The statutory provision involved is section 8(d) of the NLRA, 29 U.S.C. § 158(d) (1998). The text of this section appears at Appendix D ("App. D").

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STATEMENT OF THE CASE

The facts underlying this petition are, briefly, as follows: Mechanical Contractors Association of Northern California ("Respondent" or "MCA") and Petitioner GBA are both associations composed of various employers; both associations enter into collective bargaining agreements with various unions on behalf of their respective members. (Compl., at ¶¶ 1, 2, 4, 5 at CT 1-2, App. 39-41.)[1]

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[1] GBA refers herein to the Clerk's Transcript as "CT ___"; and the Reporter's Transcript as "RT ___." The Clerk's Transcript is set forth in Appendix E ("App. E"). The Reporter's Transcript is set forth in Appendix F ("App. F").

All of the relevant facts underlying this petition are undisputed. The undisputed facts in this action are set forth in two documents contained in the Clerk's Transcript. The first is GBA's "Separate Statement in Opposition to Plaintiff's Motion of Summary Adjudication," which will hereinafter be referred

The governing CBAs in this case explicitly prohibit their terms from being changed in any manner whatsoever except in a writing signed by the union and the affected association. (Compl., ¶ 10 at CT 4, App. 42; DUMF 11 at CT 149, App. 226-28; PUMF 3 at CT 157-158, App. 235-37.) Except for the present dispute, the parties have always honored their respective no-oral modification provisions. (RT 25:1-21, App. 350.)

In 1994, MCA proposed and GBA and MCA agreed, without Union participation, to enter into a side agreement (the "Association Side Agreement") regarding contractors changing associations during midterm of the CBAs. (CT 11-12, App. 49-51.) Under the Association Side Agreement, both associations agreed that their members could switch associations by giving written notice to both associations and that contract administration funds from those contractors which were earned after the effective date of the association change would be paid to the contractor's new association. (CT 11-12, App. 49-51; *see also* DUMF 10, at CT 148, App. 225-26.)[2]

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to as "DUMF___" and which is included in CT 145-154, App. 222-33. The second document is MCA's "Separate Statement [of Undisputed Facts] In Opposition to Defendant's Cross-Motion for Summary Judgment or Summary Adjudication of Issues," which will hereinafter be referred to as "PUMF ___" and which appears at CT 156-163, App. 234-43. Plaintiff's Complaint is referred to herein as "Compl." and appears at CT 1-16, App. 39-54.

[2] MCA and GBA are not parties to the same collective bargaining agreements. Rather, MCA and GBA have separately agreed to two written collective bargaining agreements (the "CBAs") with two local unions, Local Union 393 (in Santa Clara County, California) and Local Union 467 (in San Mateo County,

This Association Side Agreement, if agreed to by the Unions in writing, undisputedly would have modified the CBAs; however, the unions subsequently failed to agree in writing to the modifications wrought by the Association Side Agreement. (DUMF 10-11 at CT 148-149, App. 225-28.) The California Court of Appeal concluded that "MCA obtained the unions' oral, but not written, consent to the [Association Side Agreement]." (App. A at App. 10-11.) Moreover, no notice was given to any state or federal mediation agency as required by the National Labor Relations Act concerning the negotiation of this purported modification of the CBA's. (PUMF 8, at CT 159, App. 237-38.)

In 1995, MCA attempted to enforce the 1994 oral modification to the CBAs, when two GBA contractors – during the midterm of the CBAs – attempted to switch to MCA and to terminate their obligations under Petitioner's CBAs. This transfer was permissible only if the Association Side Agreement was validly adopted by the Unions. MCA then demanded that contract administration funds for those contractors be paid to MCA rather than GBA. Because the CBAs required the Unions to

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California). (CT 2, App. 40-41.) These CBAs are "Master" labor agreements, that is they are negotiated and applied to all signatory employers in the respective union's geographical jurisdiction. Significantly, a contractor signatory to the CBAs of GBA is not bound by, or a signatory to, the CBAs of MCA. Contractors may not terminate their obligations under the CBAs, including their obligation to pay contract administration funds to their association, except by giving notice in accordance with the CBAs within the period of ninety (90) and sixty (60) days before they expire. Contract administration funds are essentially dues that contractors pay to their association under the CBAs.

agree in writing to all modifications of its terms and they had not done so, GBA protested that the Association Side Agreement was unenforceable. (PUMF 13-14, at CT 161, App. 239-40; RT 22:3-23:8, App. 347-49.)

MCA brought a breach of contract action, to enforce the Association Side Agreement, (CT 1-9, App. 39-48), and the trial court entered judgment for GBA because the Association Side Agreement was unenforceable as a matter of law. (CT 218, App. 315-16.)[3] The Court of Appeal reversed the trial court and remanded the case for further proceedings not pertinent to the issues raised in this Petition. (App. A.) The California Supreme Court denied review. (App. B.)

The Petition addresses two distinct aspects of the Court of Appeal's decision which should be reviewed by this Court. The first issue, as stated by the Court of Appeal, is "Can a collective bargaining agreement be modified orally when it specifies that it may only be modified in writing?" (App. A at App. 10.) The second issue is whether the NLRA preempts GBA from asserting a defense that the Association Side Agreement is unenforceable because it was not made in accordance with section 8(d) of the NLRA.

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[3] The trial court, under *Edwards v. Centex Real Estate Corp.*, 53 Cal. App. 4th 15, 26-27 (Cal. Ct. App. 1997), effectively dismissed MCA's claim by granting GBA's motion *in limine* to exclude all of MCA's evidence because it found that the underlying Association Side Agreement was not valid and enforceable as a matter of law.

I. REASONS FOR GRANTING THE WRIT

A. This Court Should Address the Issue Of Whether It Is Legally Valid To Have An Oral Modification Of A Collective Bargaining Agreement Which Expressly Provides For Written Modification Only.

The first issue presents important questions of federal labor law that have fragmented federal Courts of Appeals and have never been addressed by this Court. Lower courts need guidance in this confused but critical area of federal labor law.[4] Additionally, judicially disregarding agreed-upon and lawful provisions in CBAs is not consistent with federal labor law policies. Allowing courts to jettison provisions in CBAs which ban oral or implied modification, as the California Court of Appeal below did, would destroy the Union-Employer bargaining process by denying certainty to those parties who mutually value confining their obligations to the "four corners" of a document. At its core, the California Court of Appeal's decision is contrary to the fundamental federal labor law principle that the substance of CBAs is left for the parties to determine. Now that a California Court of Appeal has given its unconditional imprimatur to overturning national labor policy, the need for review is heightened, especially as this case presents a rare and straightforward opportunity to review this important area of the law.

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[4] According to the AFL-CIO, 14.1 percent of all employees in the United States work under collective bargaining agreements. *See* AFL-CIO website at *http://www.aflcio.org/uniondifference/uniondiff16.htm*, *citing* Bureau of National Affairs, *Union Membership and Earnings Data Book* (1998).

1. The Federal Courts Of Appeal Have Proven Incapable Of Achieving Consistency On This Critical Area Of The Law.

Over the six-plus decades since the NLRA debuted in 1935, only two federal appellate courts before the present case have considered whether no-oral modification provisions in collective bargaining agreements may be disregarded. Beginning with *Certified Corp. v. Hawaii Teamsters & Allied Workers, Local 996,* 597 F.2d 1269 (9th Cir. 1979), a Ninth Circuit panel answered this question "yes." The Ninth Circuit vitiated the bargained-for provision against oral changes by assuming, without any support, that it knew better than the parties who had negotiated the collective bargaining agreement how to encourage a stable and peaceful industrial relationship.

In the last appellate court decision before the present case, a divided panel of the federal Court of Appeal for the District of Columbia addressed the same question that had been at issue in *Hawaii Teamsters* but rejected the Ninth Circuit's outdated and paternalistic reasoning. *See Martinsville Nylon Employees v. N.L.R.B.,* 969 F.2d 1263 (D.C. Cir. 1992).

Rather than make a raw policy decision, as the Ninth Circuit had done over two decades earlier, the D.C. Circuit analyzed federal labor law and comparable state legislation drawing from the modern approach illustrated by the Uniform Commercial Code, which has been enacted in every state. The D.C. Circuit emphasized that the Uniform Commercial Code's "no oral modification" rule best serves all parties to a contract because it "enables those parties who mutually value certainty in their relations to have it."[5] *Martinsville,* 969 F.2d at 1267.

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[5] *Martinsville* points out that "[i]n modern times the common law rule [permitting oral modifications despite no-oral modification language] has been discarded in broad areas. Most significantly, the Uniform Commercial Code, *as enacted in every state,* provides with respect to contracts for the sale of goods:

> 'A signed agreement which excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded, but except as between merchants such a requirement on a form supplied by the merchant must be separately signed by the other party.'

§ 2-209(2); *cf.* UCC § 2-208(1) ("course of performance accepted or acquiesced in without objection shall be relevant to determine the meaning of the agreement"). *See also Wisconsin Knife Works v. National Metal Crafters,* 781 F.2d 1280, 1284-85 (7th Cir. 1986) (Wisconsin UCC); *South Hampton Co. v. Stinnes Corp.,* 733 F.2d 1108, 1117 (5th Cir. 1984) ("no-oral-modification clauses are binding in Texas" under UCC); *Elmsford Sheet Metal Workers, Inc. v. Shasta Indus.,* 477 N.Y.S. 2d 391, 392 (N.Y. App. Div. 1984) (same in New York); *cf. Martens v. General Foods Corp.,* 96 N.Y.S. 2d 329, 329-30 (N.Y. App. Div. 1950) (same in pre-UCC sale of goods case). In other contexts, the old rule has been limited but not discarded altogether. *See* N.Y. Gen. Oblig. L. § 15-301(1) ("written agreement . . . which contains a provision to the effect that it cannot be changed orally, cannot be changed by an executory agreement unless such executory agreement is in writing and signed"); Cal. Civ. Code § 1698 (same). Even where the common law rule persists, there are other exceptions. In some states, if a contract, as modified, would fall within the scope of the Statute of Frauds, then the modification must be in writing. *See, e.g., Mar-Lan Indus. v. Nelson,* 635 S.W.2d 853, 855 (Tex. Ct. App. 1982)." *Martinsville,* 969 F.2d at 1267 (emphasis added).

In fact, "all potential parties to a CBA are better off under the UCC rule, which gives them the flexibility to specify as they see fit how their agreement may be modified." *Id.* at 1267-68.[6] Flexibility entails giving labor and management the *option* of having fully integrated agreements and of banning oral side agreements. And the D.C. Circuit understood that overriding a provision against oral modifications would expose the parties to the class of claims (*e.g.*, oral and implied agreements) – which even when asserted in good faith – would be most likely to breed litigation and would disturb the kind of comforting certainty that comes from knowing that your relationship is spelled out in the "four corners" of a written contract.[7] By contrast, under *Hawaii Teamsters,* it would be impossible for negotiators to know in bargaining or administering the CBAs which provisions can be, or cannot be, orally modified notwithstanding a prohibition against *all* oral modifications. They would face the prospect of having to wait for a court or arbitrator to tell them, perhaps years or decades later, that their CBAs were modified by an oral side agreement.

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[6] In *Martinsville,* the D.C. Circuit also emphasized that collective bargaining agreements, like commercial contracts, are between sophisticated parties, usually represented by specialized counsel.

[7] The measure of certainty offered by written agreements is critical in this area because "collective bargaining agreements have evolved from simple documents, specifying only a union or closed shop, a wage scale and hours of work, but without a grievance procedure or protections against discharge and without provisions governing such matters as seniority, transfers, promotions, and job classifications, to much more complex instruments which are, in effect, basic legislation governing the lives of workers." *See* David E. Feller, *A General Theory of the Collective Bargaining Agreement,* 61 CAL. L. REV. 663, 719 (1973), *citing* Archibald Cox, *Rights Under A Labor Agreement,* 69 HARV. L. REV. 601 (1956) and Cox, *The Legal Nature of Collective Bargaining Agreements,* 57 MICH. L. REV. 1 (1958).

The California Court of Appeal here independently considered, because of the conflict in the federal Courts of Appeals and the absence of California or U.S. Supreme Court authorities, the conflicting Ninth and D.C. Circuit cases. *See Alicia T. v. Los Angeles*, 222 Cal. App. 3d 869, 879 (Cal. Ct. App. 1990).[8] As discussed above, the California Court of Appeal adopted *Hawaii Teamsters'* view. *Hawaii Teamsters* and the California Court of Appeals scrapped the provision against oral modifications on the naked assumption that such judicial activism was needed to prevent an undue risk of industrial strife. The California Court of Appeal took away from the unions and the associations and their contractors the benefit of their bargain without a scintilla of support in the record below. Moreover, the California Court of Appeal ignored that the parties have regularly modified their CBAs during their midterm and have always done so in writing before and after the Association Side Agreement. (RT 25:1-21, App. 350.)

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[8] Indeed, the Supreme Court recently mentioned, but did not address, the related issue of the impact of a "zipper clause" on a federal government employer's statutory duty to bargain during the term of the contract. *See National Fed'n of Fed. Employees v. Department of the Interior*, ___ U.S. ___, 1999 WL 104407, at *2 (1999).

2. The Decision Below Introduces A Fundamental Change In Federal Labor Policy.

The idea that the parties' relative strength determines the outcome in collective bargaining and that those outcomes will be enforced is pervasive in federal labor law. With the exception of certain provisions which are made illegal by statute, the premise that federal law does not generally regulate the content of collective bargaining agreements has been constant. *See, e.g., N.L.R.B. v. Insurance Agents,* 361 U.S. 477, 488-89 (1960) (referring to collective bargaining as *"a system where the Government does not attempt to control the results of negotiations"* and where "necessity for good-faith bargaining between the parties, and the availability of economic pressure devices to each to make the other party incline to agree on one's terms . . . ") (emphasis added); *N.L.R.B. v. American Nat'l Ins. Co.,* 343 U.S. 395, 402-04 (1952) (section 8(d) of the NLRA was enacted to preclude the courts or the Board from passing upon the *content* of proposals and counterproposals made by the parties to bargaining).[9]

Hawaii Teamsters and the California Court of Appeal's views, at their core, are based on the disturbing, paternalistic assumption that substantive terms, including those prohibiting oral changes, may be judicially jettisoned where courts decide to make a raw, unconcealed policy choice that they – rather than the parties – know how to encourage industrial peace. Simply put, the unprecedented effect of *Hawaii Teamsters* and the California Court of Appeal's assumption is that courts may undo what the parties have fought for and obtained in collective bargaining – something they clearly cannot do under the United States Supreme Court decisions cited above.

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[9] Specifically, the Court in *American National Insurance Co.* stated that "the Act does not compel any agreement whatsoever between employees and employers. *Nor does the Act regulate the substantive terms* governing wages, hours and working conditions that are incorporated in an agreement." *Id.* (emphasis added).

Additionally, the ability of parties to prohibit oral or implied modifications is critical in this area of the law. During the midterm of a collective bargaining agreement, a party, upon request, must bargain over issues regarding terms and conditions of employment which are not covered in the collective bargaining agreement. *See* NLRA § 8(d), 29 U.S.C. § 158(d); *N.L.R.B. v. Jacobs Mfg. Co.*, 196 F.2d 680 (2d Cir. 1952). Because mid-term bargaining and modifications are common, it is even more critical in this area of the law that experienced parties be able to decide how their agreements can be validly modified. *See, e.g.*, *Insurance Agents*, 361 U.S. at 488-89; *America Nat'l Ins. Co.*, 343 U.S. at 402-04; *Martinsville*, 969 F.2d 1263.

3. This Court Should Review The Judgment Of The Court Below Because It Offers A Rare Clear Opportunity To Review This Vital Issue.

If the Court does not review the judgment of the California Court of Appeal, it may be years before this Court has another opportunity as clearly presented. The facts in this case are straightforward and ideally focus the issue for judicial review.

B. This Court Should Address The Issue Of Whether Courts Have Concurrent Jurisdiction With The Board Over Defenses To Enforcement Of Collective Bargaining Agreements.

This Court should also review the California Court of Appeal's ruling that GBA's defense based on noncompliance with the notice requirements of federal labor law is preempted. The issue presents a special and important question involving the rights of labor and management that should be settled by this Court. (CT 123-124, 203-204, App. 192-95, 296-99.) There is now considerable uncertainty about whether state and federal courts have concurrent jurisdiction with the Board when a defense is asserted based on noncompliance with section 8(d) of the National Labor Relations Act. In large measure this uncertainty has been caused by the California Court of Appeal disregarding the decisions of the United States Supreme Court and allowing MCA to enforce a purported modification of a collective bargaining agreement while ignoring valid defenses over MCA's noncompliance with notice requirements of federal labor statutes on the theory that concurrent jurisdiction exists for enforcement, but not for defenses to enforcement. The Court should review this issue to ensure that courts faithfully follow United States Supreme Court precedent and to provide necessary guidance on this critical but now uncertain area.

The California Court of Appeal here took an unlikely path to reject GBA's defense that the 1994 Agreement was illegal and, thus, unenforceable, noting in its decision: "[t]he NLRB has exclusive jurisdiction to adjudicate disputes involving alleged unfair labor practices." (App. A at App. 23.)

Factually, there has been no dispute that the Association Side Agreement did not comply with Section 8(d). The California Court of Appeal wrote that "it is undisputed that MCA did not furnish the unions or the appropriate state and federal agencies with written notice pursuant to Section 8(d) before MCA and GBA executed the Contract." (App. A at App. 21.) The court went on to note that "an employer's failure to provide the notice required under Section 8(d) before modifying or terminating a collective bargaining agreement has been held to be an unfair labor practice." *Id.* (citations omitted). Finally, quoting from its decision in *Green v. Mount Diablo Hospital District,* 207 Cal. App. 3d 63, 73 (Cal. Ct. App. 1989), the court acknowledged that "[c]ontracts that are contrary to express statutes or to the policy of express statutes . . . are illegal contracts. Any such illegality *voids the entire contract." Id.* at 15 (citations omitted) (emphasis added).

After making these several observations in favor of GBA's position, the court declined to rule on the merits of GBA's section 8(d) defense, claiming instead that the Board's exclusive jurisdiction over disputes involving unfair labor practices prevented it from doing so.

The California Court of Appeal's reasoning sets up an utterly irrational distinction: defensively asserting a violation of federal labor law in a civil action to enforce a modification of a collective bargaining agreement is preempted, but plaintiff's underlying claim is not. GBA has not, as the California Court of Appeal suggested, asked it to exceed its jurisdiction and find and remedy an unfair labor practice by MCA. GBA has not brought an unfair labor practice charge before the court, and it does not seek affirmative remedies for a violation. Instead, GBA has asserted the section 8(d) violation *defensively*, in response to MCA's civil contract action.

The California Court of Appeal reasoning sharply conflicts with United States Supreme Court precedent. Indeed, for nearly two decades it has been well settled that offensive use of the NLRA outside the auspices of the Board is preempted, *while defensive use of the NLRA is not. See Kaiser Steel Corp. v. Mullins*, 455 U.S. 72 (1982). *Kaiser* amplifies this distinction as follows:

> where the defense is not directed to a collateral matter but to the portion of the contract for which enforcement is sought, a court *must* entertain the defense. While only the Board may provide affirmative remedies for unfair labor practices, a court may not enforce a contract provision which violates § 8(e) [of the NLRA].

Id.[10] Were preemption to apply as the California Court of Appeal has ruled, "parties could be compelled to comply with the contract clauses, the lawfulness of which would be insulated from review by any court." *Id.*[11]

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[10] The fact that *Kaiser* involved a violation of section 8(e) while the case at bar involves a section 8(d) violation is of no moment. The relevant question is whether the Association Side Agreement violated federal labor law, not whether it violated a particular section.

[11] As a corollary, while defenses aimed at a particular provision of a collective bargaining agreement are not preempted, defenses attacking the legality of an *entire* collective bargaining agreement may be preempted. *See Glaziers and Glassworkers Local Union No. 767 v. Custom Auto Glass Distribs.*, 689 F.2d 1339, 1343-44 (9th Cir. 1982) (the employers' challenge

Because GBA raised section 8(d) only in connection with its defense of illegality directed at the Association Side Agreement, the Court of Appeal had jurisdiction and the obligation to consider it. The California Court of Appeal's flawed reasoning, if accepted, would encourage forum shopping, with parties eschewing Board proceedings for court actions, in which otherwise valid NLRA violations could not be successfully raised as a defense. Additionally, the California Court of Appeal's decision would inject intolerable circularity into this important area of the law. Indeed, preemption is a double-edged sword: a court that takes jurisdiction over an action for breach of a CBA must take on the obligation of considering *all* proper defenses to the claim. If the courts were unable to consider an otherwise valid defense due to preemption, then the claim itself would be preempted because its resolution would require consideration of all valid defenses. However, Congress and the courts have long recognized the concurrent jurisdiction of the Board and the courts in interpreting and enforcing collective bargaining agreements.[12]

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to the entire collective bargaining agreement because the union lacked majority status was preempted); *Milk Drivers and Dairy Employees Union, Teamsters Local 302 v. Vevoda*, 772 F.2d 530 (9th Cir. 1985) (a claim that the entire collective bargaining agreement was illegal on the basis of fraudulent inducement was preempted). Here, GBA raised section 8(d) as a defense only to particular provisions (*i.e.*, those dealing with contract administration funds) and not to the entire CBAs.

[12] For example, section 301(a) of the Labor Management Relation Act, 29 U.S.C. § 185(a), confers federal jurisdiction over lawsuits for violation of collective bargaining agreements. State courts have concurrent jurisdiction over such disputes. *See*

In short, review is crucial here to ensure that state and federal courts exercising concurrent jurisdiction over actions to enforce CBAs are mindful of all legitimate defenses to these claims, including defenses asserting that a contract violates federal labor laws.[13]

II. CONCLUSION

Petitioner respectfully submits that based on considerations addressed herein the Petition should be granted.

Respectfully submitted,
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PLUMBING-HEATING-COOLING CONTRACTORS ASSOCIATION OF THE GREATER BAY AREA, INC.
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Carpenters Health & Welfare Trust Fund v. Acme Indus., Inc., 224 Cal. App. 3d 187 (Cal. Ct. App. 1990) (citing *Teamsters Local v. Lucas Flour Co.*, 369 U.S. 95, 102 (1962)).

[13] Were the Court to find that no concurrent jurisdiction existed, and the Board had exclusive jurisdiction over the section 8(d) defense, then the Court would have to remand the case to the California Court of Appeal with instructions to dismiss the case due to the failure to file a charge with the Board within the six (6) month statute of limitations set forth in section 10(b) of the NLRA. *Cf. National Fed'n of Fed. Employees*, 1999 WL 104407 (remanding midterm bargaining issue to federal public sector equivalent of the Board to resolve).

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[p. 1] APPENDIX A

CERTIFIED FOR PARTIAL PUBLICATION[*]

IN THE COURT OF APPEAL OF THE STATE
OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FIVE

MECHANICAL CONTRACTORS)
ASSOCIATION OF NORTHERN) A078491
CALIFORNIA,)
Plaintiff and Appellant,) San Mateo County (Super. Ct. No. 394184)
v.)
GREATER BAY AREA) (Filed SEP. 8, 1998)
ASSOCIATION OF PLUMBING)
AND MECHANICAL)
CONTRACTORS,)
Defendant and Respondent.)

This is an action for breach of contract and declaratory relief brought by appellant Mechanical Contractors Association of Northern California (hereafter MCA) against respondent Greater Bay Area Association of Plumbing and Mechanical Contractors (hereafter GBA). Both parties are associations of licensed mechanical and plumbing contractors which act as collective bargaining agents on behalf of their members. At the outset of the trial below, the trial court granted GBA's motion *in limine* to exclude all of MCA's evidence, in effect granting a nonsuit for GBA. In accordance with the parties' stipulation, the trial court thereafter entered judgment in favor of GBA and against MCA.

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[*] Pursuant to rules 976 and 976.1, California Rules of Court, this opinion is certified for publication, with the exception of parts III. and IV.

The ultimate issue on appeal is whether a contract based on a January, 1994 letter between the parties is invalid or void as a matter of law. GBA contends the contract is invalid as a matter of law because it purports to modify certain collective bargaining [p. 2] agreements (hereafter Agreements) between MCA, GBA, and two labor unions, but without the unions' written consent thereto, as required by the Agreements. GBA also contends the contract is void because MCA failed to comply with federal statutory notice requirements for modifications to collective bargaining agreements. Finally, GBA contends that even if the contract was initially valid, it was superseded when the Agreements subsequently were extended without incorporating the contract therein. MCA opposes all these contentions on their merits.

We conclude the contract between MCA and GBA is not invalid or void as a matter of law for the reasons asserted by GBA, and that the trial court therefore erred by granting GBA's motion *in limine*. We reverse the trial court's judgment and remand this matter to the trial court for further proceedings.

STANDARD OF REVIEW

In reviewing the propriety of the order granting GBA's motion *in limine*, we will apply the standard of review applicable to an order granting a nonsuit.

As was well stated recently by Division Three of this court: "In contrast to the usual motion *in limine,* which seeks to keep particular items of evidence from a jury, an 'objection to all evidence' is essentially the same as a general demurrer or motion for judgment on the pleadings seeking to end the trial without the introduction of evidence. Such an objection is properly sustained where even if the plaintiff's allegations were proven, they would not establish a cause of action. [Citations.]" (*Edwards v. Centex Real Estate Corp.* (1997) 53 Cal.App.4th 15, 26 (*Edwards*).) Where, as here, the trial court grants a motion at the beginning of trial to exclude all evidence produced during discovery, the motion "may [also] be viewed as the functional equivalent of an order sustaining a demurrer to the evidence, or nonsuit." (*Id.* at p. 27.)

"In either case, the scope of the trial court's inquiry was relatively narrow. Both a demurrer and a motion for judgment on the pleadings accept as true all material factual allegations of the challenged pleading, unless contrary to law or to facts of which a court [p. 3] may take judicial notice. The sole issue is whether the complaint, as it stands, states a cause of action as a matter of law. [Citations.] The scope of a trial court's inquiry on a motion for nonsuit is similarly limited. A motion for nonsuit or demurrer to the evidence concedes the truth of the facts proved, but denies as a matter of law that they sustain the plaintiff's case. A trial court may grant a nonsuit only when, disregarding conflicting evidence, viewing the record in the light most favorable to the plaintiff and indulging in every legitimate inference which may be drawn from the evidence, it determines there is *no* substantial evidence to support a judgment in the plaintiff's favor. [Citations.]" (*Edwards, supra,* 53 Cal.App.4th at pp. 27-28, italics in original.)

In *Edwards,* the court concluded on the record there presented that the trial court's grant of the respondent's motions *in limine* "was tantamount to a nonsuit." (*Edwards, supra,* 53 Cal.App.4th at p. 28.) Since the record in this case supports the same conclusion, we shall treat the trial court's order granting GBA's motion *in limine* to exclude all evidence as a nonsuit. "Therefore, on this appeal we must view the evidence most favorably to [MCA], resolving all presumptions, inferences and doubts in [its] favor, and uphold the judgment for [GBA] only if it was required as a matter of law." (*Ibid.*)

We reject GBA's assertion that we must imply factual findings in favor of the trial court's judgment because MCA did not request a statement of decision pursuant to Code of Civil Procedure section 632. As MCA argues, the express language of section 632 requires a trial court to issue a statement of decision only after a "trial of a question of fact by the court." (Code Civ. Proc., § 632.) No such trial occurred in this case. Rather, the trial court only granted GBA's motion *in limine* to exclude all evidence. The general rule is that a trial court need not issue a statement of decision after a ruling on a motion. (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1294.) In fact, in ruling on GBA's motion, the trial court was bound to view all factual allegations in the light most favorable to MCA. (*Edwards, supra,* 53 Cal.App.4th at p. 27.) We must not only do the same, but must also resolve all presumptions, inferences, and doubts in MCA's favor. (*Id.* at pp. 27-28.)

[p. 4] FACTUAL BACKGROUND

MCA and GBA are associations of mechanical and plumbing contractors. Each negotiates and enters into collective bargaining agreements with labor unions on behalf of its member contractors. As multi-employer associations, MCA and GBA are parties to separate collective bargaining agreements with the labor unions whose members work for the contractors. Pertinent to this appeal, these collective bargaining agreements generally provide for the payment of "contract administration and industry funds" (hereafter Funds) by association members to their respective associations.[1]

In 1993, MCA and GBA had several disputes over whether individual members could switch their membership from one association to another while a particular collective bargaining agreement was still in effect. At issue was how to allocate Funds to the associations when a switch occurred. The parties met in December 1993 in an effort to resolve their differences, at which time Scott Strawbridge, then executive vice-president of MCA, informed GBA that MCA would shortly be presenting a written proposal for GBA's consideration.

On January 7, 1994, Strawbridge sent a letter outlining MCA's proposal to Ron Peterson, then president of GBA. Among other things, MCA proposed that the parties agree that an individual member could switch associations simply by giving written notice to both associations and that Funds earned after the effective date of the switch would be paid to the member's new association. Strawbridge included with his letter a check for $5,000 as payment in exchange for GBA's assignment to MCA of GBA's right to collect that sum from another organization known as "CPMCA."[2] Strawbridge stated [p. 5] that if GBA found the proposal acceptable, then Peterson should obtain authority from GBA's board of directors to initial the letter to signify GBA's acceptance, at which time GBA could cash the check. If GBA found the proposal unacceptable, then GBA was to return the check to MCA.

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[1] These Funds are defined as "monies earned by the respective associations for all work performed by union members under the collective bargaining agreements to which that association is signatory."

Prior to making this proposal to GBA, Strawbridge had contacted the business managers of the two unions whose Agreements would be affected if MCA and GBA agreed on the proposal, U.A. Local 467 and U.A. Local 393. Strawbridge contacted the unions because he knew that modification of any provision in the Agreements required the consent of the unions who were signatory to those Agreements. The unions indicated they would comply with whatever procedure MCA and GBA developed with respect to allowing their members to switch associations. Neither union gave its consent in writing, however.

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[2] CPMCA is the California Plumbing and Mechanical Contractors Association. Both MCA and GBA had joined CPMCA prior to their 1993 disputes. CPMCA members were required to contribute $5,000 as "seed money" upon joining the organization. GBA had contributed its share of "seed money" to CPMCA, but MCA had not. When GBA subsequently withdrew from CPMCA, the organization was unable immediately to refund GBA's $5,000.

At a meeting on January 11, 1994, GBA's board of directors agreed to accept MCA's $5,000 check. The minutes of the meeting stated in conjunction with that action that "[i]f anyone wishes to change associations they can change on the anniversary date of each year." On January 20, 1994, Peterson initialed Strawbridge's January 7 letter and returned in to MCA. GBA also sent MCA a separate letter confirming its acceptance of the $5,000 check, and thereafter cashed the check and deposited it in its bank account.

In reliance on the MCA-GBA contract (hereafter the Contract), MCA took such steps as transferring certain Funds to GBA when GBA claimed to have provided services for a contractor that had switched its membership to MCA, and allowing one if its members to switch to GBA. MCA would not have allowed the switch but for the Contract.

[p. 6] The trouble in this case began in 1995 when two members of GBA attempted to switch their affiliation to MCA. GBA refused to recognize the switch on the grounds the Contract was not binding and GBA had not agreed to the switch. Funds that would have been paid to MCA for these members continue to be paid to GBA.

PROCEDURAL BACKGROUND

On October 24, 1995, MCA filed suit against GBA for breach of contract and for a declaratory judgment that the

Contract was a binding and enforceable contract.[3] The parties thereafter filed cross-motions for summary adjudication, which the trial court denied on January 7, 1997, on the ground neither party had carried its initial burden of proof under Code of Civil Procedure section 437c.

On March 17, 1997, the first day of trial, GBA filed a motion *in limine* asking the trial court to exclude all of MCA's evidence from trial on the ground the material facts of the case were undisputed and the dispositive issue was purely legal. More specifically, GBA argued that the Contract violated the federal National Labor Relations Act (hereafter NLRA), 29 United States Code section 141 et seq., particularly section 8, subdivision (d) thereof (hereafter Section 8(d)), and that the Contract was therefore void as a matter of law under Civil Code sections 1608 and 1667.[4] GBA also argued the Contract was invalid as a matter of law because it modified the Agreements between MCA, GBA and the unions; the Agreements required that all modifications be in writing, and the unions had not consented in writing to the Contract. GBA further argued that [p. 7] even if the Contract was not void, the Contract was superseded on July 1, 1994, when MCA, GBA, and Local 467 extended the expiration date of the agreements with Local 467 (hereafter the Local 467 Agreements) without incorporating the Contract.

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[3] On or about May, 16, 1996, GBA sent a letter to MCA terminating the Contract. It thus seems, and MCA does not argue otherwise, that the Contract is no longer in effect.

[4] Civil Code section 1608 provides: "If any part of a single consideration for one or more objects, or of several considerations for a single object, is unlawful, the entire contract is void." Section 1667 provides: "That is not lawful which is: [¶] 1. Contrary to an express provision of law; [¶] 2. Contrary to the policy of express law, though not expressly prohibited; or, [¶] 3. Otherwise contrary to good morals."

MCA argued in opposition that case law supported the proposition that a collective bargaining agreement that requires modifications to be in writing can nonetheless be modified orally, and that the Contract was valid because the unions orally consented to it. MCA also argued that the Contract did not violate federal labor law, and that GBA was estopped by its conduct from asserting that the Contract was void or invalid. MCA argued in the alternative that the Contract should be viewed as an assignment by both parties to each other of their rights to contributions of Funds from members who switch from one association to the other.

On March 18, 1997, the parties filed a stipulation that the case could be tried on all the papers in the trial court's file, including all the documents the parties submitted in connection with their cross-motions for summary adjudication. The parties further stipulated that they would waive the presentation of live testimony unless the trial court deemed such testimony necessary, and that the trial court could deem the matter submitted on the basis of GBA's motion *in limine*, MCA's opposition thereto, and such argument that the court wished to hear. On the same day, the trial court held a hearing on GBA's motion *in limine*. The court did not hear any live testimony and, at the end of the hearing, took the matter under submission. The court's minutes of March 18 indicate that the court granted GBA's motion without discussion later that day.

On May 6, 1997, MCA filed a notice of appeal from the trial court's March 18 order, characterizing it both as an appealable order and as a judgment. The record, however, did not contain any signed order of the trial court granting GBA's motion *in limine* or a judgment ending the action. We subsequently notified the parties that we would dismiss this appeal unless they provided us a copy of a final, appealable judgment. [p. 8] On May 18, 1998, the parties filed a judgment, entered by the trial court on March 18, 1997 *nunc pro tunc*. We accordingly have jurisdiction over this appeal.

DISCUSSION

I. The Contract Is Not Invalid as a Matter of Law on the Ground It Violates the Requirement in the Agreements That All Modifications Must Be in Writing

The first issue we address is whether the Contract is invalid because it modifies the parties' Agreements with Locals 393 and 467 without the unions' written consent. The issue is raised on the following undisputed facts: The parties' Agreements with Locals 393 and 467 each require that all modifications be in writing signed by a duly authorized representative of the union. The Contract modifies the Agreements between MCA, GBA, and the unions. MCA obtained the unions' oral, but not written, consent to the Contract.

Can a collective bargaining agreement be modified orally when it specifies that it may only be modified in writing?

MCA argues that such collective bargaining agreements may be modified orally, relying on *Certified Corp. v. Hawaii Teamsters & Allied Workers Wkrs.* (9th Cir. 1979) 597 F.2d 1269 (*Hawaii Teamsters*), a case decided by the United States Court of Appeals for the Ninth Circuit. In *Hawaii Teamsters*, the Ninth Circuit held that a written collective bargaining agreement that contained a clause providing that the agreement could not be modified except in writing could nonetheless be orally modified as to its duration. The court thus applied the general common law rule of contracts that "in the absence of a statute preventing oral modification of a contract, a written contract can *always* be orally modified, even if its express terms prohibit modification except in writing." (*Id.* at p. 1271, italics in original.) The Ninth Circuit recognized that courts do not strictly adhere to common law contract rules when interpreting collective bargaining agreements, but nonetheless reasoned that such a rule, applied in the collective bargaining context, "is not contrary to federal labor policies and in fact effectuates the federal policy of maintaining 'industrial peace.' See *Vaca v. Sipes*, 386 U.S. 171, 182 (1967). It [p. 9] encourages resolution of labor disputes by negotiation rather than by the economic pressure of a strike. . . . See *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456-457 (1957) [hereafter *Textile Workers*];. . . . " (*Hawaii Teamsters, supra*, 597 F.2d at p. 1271, fn. omitted.)

GBA relies on conflicting authority from the United States Court of Appeals for the District of Columbia Circuit in arguing that the Agreements may not be modified except in writing. In *Martinsville Nylon Employees Council v. N.L.R.B.* (D.C. Cir. 1992) 969 F.2d 1263 (*Martinsville*), the court rejected the Ninth Circuit's reasoning, and held that when a collective bargaining agreement requires modifications to be in writing, oral modifications are prohibited. The court's conclusion was not based on cases involving collective bargaining agreements, but instead on the Uniform Commercial Code (hereafter UCC). (*Id.* at p. 1267.) The *Martinsville* court stated: "The drawback of the common law rule is that it denies to all contracting parties, no matter how sophisticated, the ability to decide for themselves whether to restrict the manner in which their agreement may be modified. The UCC rule, on the other hand, enables those parties who mutually value certainty in their relations to have it; under the UCC rule, moreover, no one has to agree to rule out oral modifications nor, having so agreed, are the parties precluded from executing a mutually agreeable modification. [¶] The parties to a [collective bargaining agreement], like 'merchants' within the meaning of UCC § 2-104, are sophisticated. Their agreement is the product of substantive negotiations between intensely interested parties, usually advised by specialized counsel. They ought not be presumed to have included in their agreement a meaningless provision against oral modifications. Nor is there any need to fear that either party may have missed the fine print or somehow been taken advantage of in agreeing that there shall be no oral modifications." (*Id.* at p. 1267.)

The court in *Martinsville* disagreed with the Ninth Circuit's observation that applying the common-law rule would promote industrial peace. The court concluded [p. 10] instead that such a rule would more likely result in increased industrial strife. (*Martinsville, supra,* 969 F.2d at p. 1268.) In addition, the court characterized the Ninth

Circuit's holding in *Hawaii Teamsters* as dicta. The court opined that the Ninth Circuit could merely have characterized the modification in that case as an independent oral contract and thereby avoided the question of whether the oral modification was effective. (*Martinsville, supra*, 969 F.2d at p. 1268.)

The parties have not cited, and we have not found through independent research, any opinion by the United States Supreme Court or the California Supreme Court discussing this issue. We therefore exercise our independent judgment as to which line of authority controls. (*Alicia T. v. County of Los Angeles* (1990) 222 Cal.App.3d 869, 879.) We conclude for several reasons that *Hawaii Teamsters* controls.

First, as MCA argues, were we to adopt a rule different from the Ninth Circuit, we would encourage California litigants to forum-shop between California's federal and state courts depending on whether they seek to validate or discredit an oral modification to a collective bargaining agreement. This is a relevant and important consideration that supports adopting the *Hawaii Teamsters* rule. (Accord *Webb v. Superior Court* (1990) 225 Cal.App.3d 990, 1000.)

Second, and more important, we believe, as did Judge Wald in her dissent in *Martinsville*, that *Hawaii Teamsters* is the better-reasoned decision. It is the duty of the federal courts to fashion the rules applicable when interpreting collective bargaining agreements. (*Litton Financial Printing Div. v. NLRB* (1991) 501 U.S 190, 202-203; *Textile Workers, supra*, 353 U.S at pp. 456-457.) Those rules must take into account "the policy of our national labor laws." (*Textile Workers, supra,* 353 U.S. at p. 456.) "The federal labor laws seek to promote industrial peace and the improvement of wages and working conditions by fostering a system of employee organization and collective bargaining." (*Vaca v. Sipes, supra,* 386 U.S. at p. 182; *McCarroll v. L.A. County Etc. Carpenters* (1957) 49 Cal.2d 45, 56.)

[p. 11] In her dissent in *Martinsville,* Judge Wald argued that the goal of industrial peace is better served by allowing flexibility in the performance of a collective bargaining agreement rather than by maintaining rigid certainty. (*Martinsville, supra,* 969 F.2d at p. 1271, dis. opn of Wald, J.) As support for her position, Judge Wald relied heavily on Justice Goldberg's concurring opinion in *Humphrey v. Moore* (1964) 375 U.S. 335, in which Justice Goldberg wrote: "There are too many unforeseeable contingencies in a collective bargaining relationship to justify making the words of the contract the exclusive source of rights and duties." (*Id.* at pp. 353-354.)

Justice Goldberg has not been alone in his view of collective bargaining agreements. In *Watson v. International Bro. of T., C., W. & H of America* (5th Cir. 1968) 399 F.2d 875, the United States Court of Appeals for the Fifth Circuit stated: "[C]ollective bargaining agreements . . . involve the triangle of often diverging interests of employers, unions, and employees covering a wide range of conduct and an enormous variety of problems. The necessary task of filling in the details is inherent. *A collective bargaining contract operates prospectively over a substantial period of time and the parties cannot be expected to foresee all the problems that will develop in an industrial establishment within the period of the contract and more scope* *must be left for decisions made in the course of performing the agreement. The parties to the collective bargaining agreement share a degree of mutual interdependence for the cost of disagreement is great and the pressure to reach agreement is so intense that the parties are willing to contract with the thought in mind of working out the problems of interpreting and amending when the inevitable problems arise."* (*Id.* at p. 879, fn. omitted, italics added.)

Our court has recognized the need for flexibility in the performance of collective bargaining agreements. In *Rebeiro v. Nor-Cal Integrated Ceilings* (1982) 135 Cal.App.3d 522, the court stated: " '[A] collective bargaining agreement is not an ordinary contract' (*John Wiley & Sons v. Livingston* (1963) 376 U.S. 543, 550) and is not governed by the common law concepts that control private contracts. (*Carpenters 46* [p. 12] *Northern Cal. Counties Conf. Bd. v. Valentine* (1982) 131 Cal.App.3d 534.) *'[I]t is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate.'* (*Steelworkers v. Warrior & Gulf Co.* (1959) 363 U.S. 574, 578.)" (*Rebeiro v. Nor-Cal Integrated Ceilings, supra,* 135 Cal.App.3d at p. 532, italics added.)

GBA argues that the desire for flexibility is satisfied by allowing the parties to a collective bargaining agreement to decide how the agreement may be modified. We disagree because, as the above-cited authorities persuasively demonstrate, the need for flexibility stems from the fact that the parties to a collective bargaining agreement cannot anticipate every problem that may arise *after* an agreement is entered into. We agree with Judge Wald and the *Hawaii Teamsters* court that the goal of industrial peace is better served by allowing the parties to a collective bargaining agreement to modify the agreement orally even if the agreement contains a provision requiring modifications to be in writing.

We disagree with the *Martinsville* majority on three other points as well. First, we join Judge Wald in questioning the *Martinsville* majority's comparison of collective bargaining agreements to standard commercial sales contracts. As the authorities cited by Judge Wald demonstrate, labor law experts dispute the majority's implicit conclusion that collective bargaining agreements are sufficiently similar to standard sales contracts as to justify application of the UCC. (*Martinsville, supra,* 969 F.2d at p. 1271, fn. 1, and authorities cited therein.) Indeed, the United States Supreme Court has recognized that "[a] collective bargaining agreement is not an ordinary contract for the purchase of goods and services, nor is it governed by the same old common-law concepts which control such private contracts." (*Consol. Rail Corp. v. Railway Labor Executives* (1989) 491 U.S. 299, 311, internal quotation marks omitted.)

Second, while application of the *Hawaii Teamsters* rule may render the modification-in-writing provision in a collective bargaining agreement meaningless, the *Martinsville* majority overstated the significance of this concern. (See *Martinsville,* [p. 13] *supra,* 969 F.2d at p. 1267.) It is well settled that courts do not rigidly apply the normal rules of contract interpretation when interpreting collective bargaining agreements. (*Hawaii Teamsters, supra,* 597 F.2d at p. 1271; *Rebeiro v. Nor-Cal Integrated Ceilings, supra,* 135 Cal.App.3d at p. 532.) Thus, the fact that the modification-in-writing provision of a collective bargaining agreement ultimately may be unenforceable does not justify inflexible adherence to it.

Third, the *Martinsville* majority's characterization of the *Hawaii Teamsters* decision as dicta is ironic in light of the fact that the majority stated plainly that it did not have to decide whether to choose between the UCC rule and the common law rule applied in *Hawaii Teamsters* because the collective bargaining agreement at issue in *Martinsville* contained an "entire agreement" clause. The *Martinsville* court stated: "Whatever the ultimate merits of the common law rule denying effect to the no-oral-modification clause, by including the entire agreement clause the parties here made clear beyond doubt their intention not to be bound to any informal arrangement to which they might voluntarily adhere during the term of their CBA." (*Martinsville, supra,* 969 F.2d at p. 1268.) Thus, the *Martinsville* majority's expressed preference for the UCC rule in this context may itself be characterized as dicta.

We reject GBA's assertion that we should disregard *Hawaii Teamsters* because it is a "legal dinosaur." GBA cites no authority, nor are we aware of any, that makes the mere age of an opinion relevant in determining its precedential value. As our foregoing discussion demonstrates, the logical force of *Hawaii Teamsters* has not diminished over time. Moreover, contrary to GBA's assertion, the *Hawaii Teamsters* rule has been cited with approval fairly recently by at least two other federal circuit courts of appeal and one federal district court. (See *Merk v. Jewel Food Stores* (7th Cir. 1991) 945 F.2d 889, 895; *Eastern Air Lines v. Air Line Pilots Ass'n* (11th Cir. 1988) 861 F.2d 1546, 1555; *N.L.R.B. v. Deauville Hotel* (11th Cir. 1985) 751 F.2d 1562, 1569, fn. 10; *Local 1316, I. Bro. of E.W. v. Superior C. & A.* (N.D.Ga. 1985) 608 F.Supp. 1246, 1250.)

And, in fact, two of [p. 14] the cases cited by GBA as supporting the *Martinsville* rule themselves predate *Hawaii Teamsters*. (See *Lewis v. Seanor Coal Company* (3d Cir. 1967) 382 F.2d 437; *Gatliff Coal Co. v. Cox* (6th Cir. 1945) 152 F.2d 52.) Thus, GBA's characterization of *Hawaii Teamsters* as a "legal dinosaur" is unwarranted and, in any event, unpersuasive.

Finally, GBA cites Civil Code section 1698 as being in accord with *Martinsville*. Section 1698, subdivision (c) provides: "(c) *Unless the contract otherwise expressly provides,* a contract in writing may be modified by an oral agreement supported by new consideration. . . . " (Italics added.)

While Civil Code section 1698, subdivision (c) arguably supports GBA's position, we must keep in mind that we are here dealing with collective bargaining agreements, the interpretation of which is a matter of federal, not state, law. (*Litton Financial Printing Div. v. NLRB, supra,* 501 U.S. at pp. 202-203; *Textile Workers, supra,* 353 U.S. at pp. 456-457.) We have acknowledged the split of authority among the federal courts on the issue before us, and have concluded that the better view allows oral modifications of a collective bargaining agreement even if the agreement specifies that modifications must be in writing. Civil Code section 1698, subdivision (c), a state statute, cannot serve to prohibit what federal law allows. (*Allis-Chalmers Corp. v. Lueck* (1985) 471 U.S. 202, 210-211 (*Allis-Chalmers*);[5] *Fox*

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[5] In *Allis-Chalmers,* the United States Supreme Court stated: "If the policies that animate § 301 [of the Labor Management

v. General Motors Corp. (S.D.W.Va. 1994) 859 F.Supp. 216, 219, fn. 5.)[6]

Relations Act] are to be given their proper range . . . , the preemptive effect of § 301 must extend beyond suits alleging contract violations. These policies require that 'the relationships created by [a collective-bargaining] agreement' be defined by application of 'an evolving federal common law grounded in national labor policy.' [Citation.] The interests in interpretive uniformity and predictability that require that labor-contract disputes be resolved by reference to federal law also require that the meaning given a contract phrase or term be subject to uniform federal interpretation. Thus, questions relating to what the parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches of that agreement, must be resolved by reference to uniform federal law, whether such questions arise in the context of a suit for breach of contract or in a suit alleging liability in tort. Any other result would elevate form over substance and allow parties to evade the requirements of § 301 by relabeling their contract claims as claims for tortious breach of contract. [¶] Were state law allowed to determine the meaning intended by the parties in adopting a particular contract phrase or term, all the evils addressed in [*Teamsters v. Lucas Flour Co.* (1962) 369 U.S. 95] would recur. The parties would be uncertain as to what they were binding themselves to when they agreed to create a right to collect benefits under certain circumstances. As a result, it would be more difficult to reach agreement, and disputes as to the nature of the agreement would proliferate. Exclusion of such claims 'from the ambit of § 301 would stultify the congressional policy of having the administration of collective bargaining contracts accomplished under a uniform body of federal substantive law.' [Citation.]" (*Allis-Chalmers, supra,* 471 U.S. at pp. 210-211.)

[6] This is not to say that no statute could ever preclude oral modification of a collective bargaining agreement. For example, in *Lewis v. Seanor Coal Company, supra,* 382 F.2d at page 442, the court held that an oral modification to a provision in a collective bargaining agreement requiring the employer to make

[p. 15] For these reasons, we conclude that the Ninth Circuit's decision in *Hawaii Teamsters* shall control in this case. Consequently, the fact that Locals 393 and 467 did not consent in writing to the Contract does not amount to a violation of the Agreements. The Contract is not invalid as a matter of law on this ground.

II. Under the Circumstances of This Case, GBA's Contention That the Contract Violates the Notice Requirements of Section 8(d) of the NLRA Cannot Serve as a Ground on Which to Declare the Contract Void

GBA also contends the Contract is void because it violates the notice requirements set forth in Section 8(d) of the NLRA. The unstated implication is that MCA's alleged violation of Section 8(d) is an unfair labor practice under the NLRA.

"Contracts that are contrary to express statutes or to the policy of express statutes . . . are illegal contracts. [Citation.] Any such illegality voids the entire contract. [Citation.]" (*Green v. Mt. Diablo Hospital Dist.* (1989) 207 Cal.App.3d 63, 73.)

[p. 16] Section 8(d) provides, in pertinent part, that "to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good

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payments to a union welfare trust fund was invalid in large part because a federal statute required that the detailed basis on which such payments were to be made had to be specified in writing.

faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided,* That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification – [¶] (1) serves a written notice upon the other party to the contract of the proposed termination or modification . . . [and] [¶] (3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; . . . " (29 U.S.C. § 158, subd. (d)(1), (3).)

Here, it is undisputed that MCA did not furnish the unions or the appropriate state and federal agencies with written notice pursuant to Section 8(d) before MCA and GBA executed the Contract. Generally, an employer's failure to provide the notice required under Section 8(d) before modifying or terminating a collective bargaining agreement has been held to be an unfair labor practice. (See *Nabors Trailers, Inc. v. N.L.R.B.* (5th Cir. 1990) 910 F.2d 268, 276; *Ariz. Laborers, Etc. v. Conquer Cartage Co.* (9th Cir.

1985) 753 F.2d 1512, 1516-1517; *McCarroll v. L.A. County Etc. Carpenters, supra,* 49 Cal.2d at pp. 56-57.)

MCA nonetheless opposes GBA's contention on two grounds. First, MCA contends the notice requirement does not apply to the Contract because the Contract was [p. 17] negotiated only between MCA and GBA and therefore does not constitute "collective bargaining" within the meaning of Section 8(d). At most the Contract is a midterm modification of the Agreements as to which the notice requirement does not apply. Second, MCA contends that the National Labor Relations Board (hereafter NLR) has exclusive jurisdiction to remedy violations of Section 8(d).

In *N.L.R.B. v. Local 554* (7th Cir. 1993) 991 F.2d 1302, the United States Court of Appeals for the Seventh Circuit upheld an NLRB determination that the notice requirements of Section 8(d) do not apply to renegotiations of collective bargaining agreements that take place prior to the natural expiration of the agreements. (*Id.* at p. 1306.) The court stated: " . . . [T]he [NLRB] concluded that Section 8(d) applies to termination or modification of a collective bargaining relationship taking place after the natural expiration of the labor contract. It does not apply to circumstances of renegotiation taking place prior to the natural expiration of the labor contract. We need not debate the relative policy advantages of requiring or not requiring such notice in cases of renegotiation. Congress left that task to the Board by conferring upon it the responsibility to formulate national labor policy. The Board has spoken decisively in this case against the need for Section 8(d) notice in circumstances of renegotiation. We defer to the Board's conclusion, finding it neither irrational nor inconsistent with the purposes of the Act. There are good reasons not to require notice where the same exigencies which caused the need for renegotiation might make a prolonged notice period impractical." (*N.L.R.B. v. Local 554, supra,* 991 F.2d at p. 1306.)

Here, according to GBA's own brief, the Agreements with Local 393 were originally set to expire on June 30, 1995. The Local 467 Agreements were year-to-year, from July 1 to June 30 of each year. Clearly, the Contract, which was implemented between December 1993 and January 1994, was a midterm modification of those Agreements. It is arguable, therefore, that the notice requirements of Section 8(d) were [p. 18] not applicable. (*N.L.R.B. v. Local 554, supra,* 991 F.2d at p. 1306.) Thus, it is not at all clear that MCA committed an unfair labor practice in this case.

This brings us to the main problem with GBA's contention. The NLRB has exclusive jurisdiction to adjudicate disputes involving alleged unfair labor practices. (See *San Diego Unions v. Garmon* (1959) 359 U.S. 236, 244-245; *Machinists Automotive Trades Dist. Lodge v. Peterbilt Motors Co.* (1990) 220 Cal.App.3d 1402, 1407 ["where the activity which is the subject of suit is either arguably prohibited or arguably protected by the NLRA, state court jurisdiction must yield to the exclusive jurisdiction of the NLRB"].) Indeed, the United States Supreme Court has stated that "[t]he [NLRB] is vested with primary jurisdiction to determine *what is or is not an unfair labor practice.*" (*Kaiser Steel Corp. v. Mullins* (1982) 455 U.S. 72, 83, italics added.) Although there are exceptions to this rule of preemption (see, e.g., *Rodriguez v. Yellow Cab Cooperative, Inc.* (1988) 206 Cal.App.3d 668, 676-677), where, as here, the dispute centers on whether the challenged conduct violated the collective bargaining process itself, none of those exceptions apply (see 29 U.S.C. § 151; *Metropolitan Life Ins. Co. v. Massachusetts* (1985) 471 U.S. 724, 753-754; *N.L.R.B. v. R&H Coal Co., Inc.* (4th Cir. 1993) 992 F.2d 46, 50, fn. 2; *Rodriguez v. Yellow Cab Cooperative, Inc., supra,* 206 Cal.App.3d at pp. 676-678).

Accordingly, were we to conclude that MCA committed an unfair labor practice we would be exceeding our jurisdiction and impinging on the jurisdiction of the NLRB. Therefore, in the context of this case MCA's alleged violation of Section 8(d) cannot serve as a basis for this court to declare the Contract void as a matter of law.

III. The Parties' July 1, 1994 Extension of the Local 467 Agreements Did Not Supersede the Contract as a Matter Of Law

GBA also contends that even if the Contract validly modified the parties' Agreements, the Contract was superseded with respect to the parties' Agreements with Local 467 when those Agreements were extended effective July 1, 1994. This contention is based on an integration clause contained in the Local 467 Agreements. The integration [p. 19] clause provides: "This agreement contains all covenants, stipulations and provisions agreed upon by the parties hereto, and no agent or representative of either party has authority to make, and none of the parties shall be bound by or liable for, any statement, representation, promise, inducement, or agreement not set forth herein." According to GBA, the Contract did not survive past July 1, 1994, because it was never added, expressly or otherwise, to the extended Agreements with Local 467.

GBA's contention is flawed in two respects. First, accepting GBA's argument at face value, the trial court would have been justified in excluding evidence concerning Local 467's consent to the Contract. Since GBA has specifically confined this argument to the Local 467 Agreements, and since the record apparently does not contain any evidence that would allow this argument to encompass the Agreements with Local 393, this argument provides no justification for the trial court's exclusion of MCA's evidence concerning the Agreements with Local 393.

Second, and more important, it is not clear that the Contract was rendered inoperative as a matter of law by the integration clause of the extended Local 467 Agreements. As MCA argues, "collective-bargaining agreements may include implied, as well as express, terms." (*Consol. Rail Corp. v. Railway Labor Executives, supra,* 491 U.S. at p. 311.) "An employer's established past practice can become an implied term of a collective bargaining agreement. [Citations.] Past practices rise to the level of an implied agreement when they have ripened into an established and recognized custom between the parties. [Citations.]" (*Bonnell/Tredegar Industries, Inc. v. N.L.R.B.* (4th Cir. 1995) 46 F.3d 339, 344, internal quotation marks omitted [employer's established past practice of paying Christmas bonus can become implied term of collective bargaining agreement and employer's attempt not to disburse bonus after 18-year history of paying it violates NLRA]; see also *Martinsville, supra,* 969 F.2d at pp. 1269-1270.) Whether a past practice is an implied term of a collective bargaining agreement is a question of fact. (See *Lodge No. 306 v. Alton & Southern Ry. Co.* (8th Cir. 1988) 849 F.2d 1111, 1114; cf. [p. 20] *Local 512, Warehouse & Office Workers' v. N.L.R.B.* (9th Cir. 1986) 795 F.2d 705, 712 [whether parties have agreed on terms of collective bargaining agreement is question of fact].)

Here, there is evidence in the record indicating that the procedure set forth in the Contract by which members of either MCA or GBA could switch membership to the other association may well have become an implied term of the Agreements. Moreover, there is no evidence that MCA, GBA, or Local 467 did not intend to continue that procedure as an implied term of the extended Local 467 Agreements. Indeed, the evidence suggests to the contrary that Local 467 may have believed that the procedure remained in place after the Local 467 Agreements were extended.

It may well be that a trial upon these matters would reveal that the parties in fact intended to supersede the Contract when they agreed to extend the Local 467 Agreements. Under the circumstances of this appeal, however, we cannot conclude that the extended Agreements superseded the Contract as a matter of law.

IV. Remaining Arguments

The remainder of the parties' arguments on appeal merit little or no discussion. In light of our conclusion that the Contract is not invalid or void as a matter of law, we decline to consider MCA's contentions that GBA has waived its right to challenge the validity of the Contract, and that the Contract should be deemed an assignment of rights to Funds by the parties. Nor need we reach GBA's contention that MCA is barred for various reasons from raising the aforementioned issues on appeal.

The only remaining issue that merits brief comment is GBA's contention that MCA is barred from presenting evidence of the unions' oral consent to the Contract by the parol evidence rule. According to GBA, such evidence would contradict the fact that only MCA and GBA were parties to the Contract. Assuming arguendo that the Contract is a partially integrated writing, as GBA asserts, GBA fails to cite any evidence proffered by MCA suggesting that the unions or MCA considered the unions to be parties to the [p. 21] Contract. Indeed, MCA admits on appeal that it is not claiming that the unions were parties to the Contract. The evidence at most demonstrates that the unions consented to and recognized the membership change procedure set forth in the Contract. In our view, that evidence is not inconsistent with the Contract and is therefore not barred under the parol evidence rule. (*Esbensen v. Userware Internat., Inc.* (1992) 11 Cal.App.4th 631, 637.)

DISPOSITION

The judgment is reversed. This matter is remanded to the trial court for further proceedings in accordance with the views expressed in this opinion. The parties are to bear their own costs.

[p. 22] ____________________
Jones, Acting P.J.

We concur:

Haning, J.

Champlin, J.*

* Judge of the Superior Court of Napa County, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

[p. 23] Trial court:	San Mateo County Superior Court
Trial judge:	Hon. Judith W. Kozloski
Counsel for plaintiff and appellant:	James A. Carter Michelle Q. Carter Carter & Carter
Counsel for defendant and respondent:	Daniel A. Croley Salime Samii Littler Mendelson

A078491

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APPENDIX B

First Appellate District, Division Five, No. A078491
S074143

IN THE SUPREME COURT OF CALIFORNIA

(Filed Dec. 16, 1998)

MECHANICAL CONTRACTORS ASSOCIATION OF NORTHERN CAL, Appellant

v.

GREATER BAY AREA ASSOCIATION OF PLUMBING AND MECHANICAL CONTRACTORS, Respondent

---

Respondent's petition for review DENIED.

GEORGE
Chief Justice

APPENDIX C

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN MATEO

HONORABLE: JUDITH WHITMER KOZLOSKI **JUDGE**	**DEPT. NO.:** 10
DATE: March 18, 1997	Linda Fitzgibbon **CLERK**
FILE NO: 394184	Pamela Fisk **REPORTER**

(TITLE OF ACTION)	**(APPEARANCES)**
MECHANICAL CONTRACTORS ASSOCIATION OF NOTHERN CALIFORNIA Plaintiff	J. CARTER FOR PLAINTIFF
vs.	
GREATER BAY AREA ASSOCIATION OF PLUMBING AND MECHANICAL CONTRACTORS Defendant	DANIEL A CROLEY FOR DEFENDANT SALIME' SAMII FOR DEFT.

NATURE OF PROCEEDINGS COURT TRIAL

9:15 A.M. COURT CONVENED. COUNSEL AS LISTED ABOVE PRESENT. THE MATTER WAS ORALLY ARGUED BY COUNSEL AND SUBMITTED. MATTER TAKEN UNDER SUBMISSION.

3:00 P.M. HEARING IN THE ABOVE ENTITLED MATTER HAVING BEEN HELD AND THE MATTER SUBMITTED TO THE COURT FOR CONSIDERATION AND DECISION, AND THE COURT NOW BEING FULLY ADVISED IN THE PREMISES HEREIN RENDERS ITS DECISION AS FULLY SET FORTH BELOW:

DEFENDANT'S MOTION IN LIMINE TO EXCLUDE ALL OF MCA'S EVIDENCE FROM TRIAL IS GRANTED."

DATE: March 18, 1997
NATURE OF PROCEEDINGS: __________000___

APPENDIX D

29 U.S.C. § 158. Unfair labor practices

(d) Obligation to bargain collectively

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided,* That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification –

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2) to (4) of this subsection shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 159(a) of this title, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within any notice period specified in this subsection, or who engages in any strike within the appropriate period specified in subsection (g) of this section, shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 158, 159 and 160 of this title, but such loss of status for such employee shall terminate if and when he is reemployed by such employer. Whenever the collective bargaining involves employees of a health care institution, the provisions of this subsection shall be modified as follows:

(A) The notice of paragraph (1) of this subsection shall be ninety days; the notice of paragraph (3) of this subsection shall be sixty days; and the contract period of paragraph (4) of this subsection shall be ninety days.

(B) Where the bargaining is for an initial agreement following certification or recognition, at least thirty days' notice of the existence of a dispute shall be given by the labor organization to the agencies set forth in paragraph (3) of this subsection.

(C) After notice is given to the Federal Mediation and Conciliation Service under either clause (A) or (B) of this sentence, the Service shall promptly communicate with the parties and use its best efforts, by mediation and conciliation, to bring them to agreement. The parties shall participate fully and promptly in such meetings as may be undertaken by the Service for the purpose of aiding in a settlement of the dispute.

APPENDIX E

COURT OF APPEAL, STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT

MECHANICAL CONTRACTORS
ASSOCIATION, ETC.,
Plaintiff/Appellant

vs.

GREATER BAY AREA
ASSOCIATION, ETC.,
Defendant/Respondent

Court of Appeal No.
A078491

Superior Court No.
394184

CLERK'S TRANSCRIPT ON APPEAL FROM THE JUDGMENT OF THE SUPERIOR AND MUNICIPAL COURTS, STATE OF CALIFORNIA, COUNTY OF SAN MATEO

HONORABLE JUDITH W. KOZLOSKI, JUDGE

NOTICE OF APPEAL FILED MAY 6, 1997

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MECHANICAL CONTRACTORS ASSOCIATION
OF NORTHERN CALIFORNIA

Summons Issued
IN THE SUPERIOR COURT OF CALIFORNIA
FOR THE COUNTY OF SAN MATEO

MECHANICAL CONTRACTORS ASSOCIATION OF NORTHERN CALIFORNIA, a California Corporation, Plaintiff,	**Case No. 394184** **COMPLAINT FOR DAMAGES FOR BREACH OF CONTRACT AND FOR DECLARATORY JUDGMENT**
v.	**JURY DEMANDED**
GREATER BAY AREA ASSOCIATION OF PLUMBING AND MECHANICAL CONTRACTORS, a California Corporation, Defendant.	**(Filed OCT. 24, 1995)**

Plaintiff alleges:

1. Plaintiff MECHANICAL CONTRACTORS ASSOCIATION OF NORTHERN CALIFORNIA (hereafter "MCA") is a California corporation doing business as an

association of licensed mechanical and plumbing contractors which acts as collective bargaining agent on behalf of its members. MCA's principal place of business is in the County of Contra Costa, State of California.

[p. 2] 2. Defendant GREATER BAY AREA ASSOCIATION OF PLUMBING AND MECHANICAL CONTRACTORS (hereafter "GBA") is a California corporation doing business as an association of mechanical and plumbing contractors with its principal place of business in the State of California, County of San Mateo.

3. Venue is proper in this County because, *inter alia*, defendant's primary place of business is located in this County and because the contract at issue herein was entered into here.

4. MCA and GBA are competitors, to wit, each acts as bargaining agent for its members in conjunction with the applicable unions for purposes of both the negotiations leading to collective bargaining agreements and the administration of those agreements.

5. Both GBA and MCA are parties to separate collective bargaining agreements (on behalf of their constituent members) with various unions under which both MCA's and GBA's members perform contracting services. Those collective bargaining agreements provide for the payment of contract administration and industry funds ("funds") which are monies earned by the respective associations for all work performed by union members under the collective bargaining agreements to which that association is signatory. Under the provisions of these collective bargaining agreements, "funds" are initially paid by the member contractor to a trust administrator

which then distributes them to the appropriate association.

6. During 1993, certain disputes arose between MCA and GBA concerning the ability of contractor-members to change [p. 3] associations while the applicable collective bargaining agreement remained in force, and the allocation of "funds" paid by those members after they changed associations.

7. Prior to the disputes between MCA and GBA referred to in paragraph 6, *supra*, both MCA and GBA had joined a newly formed statewide association of contractors, the "CPMCA". GBA had contributed $5,000 of "seed money" to CPMCA while MCA had not contribute any "seed money". GBA subsequently changed its mind and decided to withdraw from CPMCA. Because of a shortage of cash, CPMCA was unable to immediately refund GBA's "seed money".

8. In an effort to resolve their disputes and avoid litigation, representatives of MCA and GBA (including the President of each association) met in December of 1993. At that meeting, MCA proposed an agreement with GBA whereby: (1) MCA would give GBA $5,000 immediately in exchange for an assignment of GBA's right to recoup its "seed money" from CPMCA; (2) the disputes between MCA and GBA were deemed resolved; and (3) to avoid repetitions of the disputes in the future, both associations would agree that their rights to "funds" paid under the relevant collective bargaining agreements be modified by a new agreement which provided that either association's members could switch associations by giving written notice to both associations, the change to be

effective on the anniversary date of the applicable collective bargaining agreement (July 1), and that "funds" which were earned after the effective date of the association change would be paid to the member's new association.

9. Because the modification of collective bargaining [p. 4] agreements proposed by MCA's offer would require the consent of the affected unions (who were signatory to those agreements), MCA sought the advance approval of the unions. The business managers for both of the affected unions (U.A. Locals 467 and 393) stated that they did not want to become involved in the disputes between associations. Both unions stated to MCA that they would accept whatever agreement was reached by MCA and GBA with respect to members who wished to change associations.

10. By their conduct described in paragraph 9, *supra*, the unions waived the provision of the collective bargaining agreements which required all changes to be in a writing signed by a duly authorized representative of the union.

11. By letter dated January 7, 1994, MCA formalized its prior proposal into a formal written offer which it mailed, along with a check for the $5,000 made out to GBA, to GBA's President, Ron Peterson. The offer, by its terms, was to be accepted by Peterson initialing the letter (as confirmation of GBA's agreement) after getting authorization from GBA's Board of Directors. The letter also explicitly stated that GBA was to return the check if it did not accept the offer.

12. Several days later, Peterson responded to MCA that he would present the offer to GBA's Board of Directors for approval.

13. On or about January 20, 1994, GBA's President Ron Peterson initialed the letter and returned it to MCA, manifesting GBA's acceptance of the offer. A true and correct copy of this executed letter agreement (hereafter "MCA-GBA agreement") is attached hereto as Exhibit "A".

[p. 5] 14. On the same date, GBA sent confirmation to CPMCA that "MCA has taken GBA's position for 'seed money' ". A true and correct copy of that notification is attached hereto as Exhibit "B".

15. On or about the same date, GBA also cashed the $5,000 check as authorized upon its acceptance of the "MCA-GBA agreement".

16. Soon thereafter at a legislative conference in Sacramento, GBA's then Vice-President (Frank Park) independently confirmed the settlement (i.e. GBA's acceptance of MCA's offer) to MCA's Executive Vice-president (Scott Strawbridge) and expressed his satisfaction that the past problems between their respective associations had been resolved.

17. MCA has relied in good faith, and to its detriment, on the existence of the MCA-GBA agreement by, *inter alia*: transferring certain fund contributions ($570.38) to GBA when GBA claimed to have provided services for the member even though the affected member (Metro Plumbing) had changed its affiliation to MCA as provided in the agreement, and by allowing Egan Plumbing

to change from MCA to GBA even though it would not have done so in the absence of the MCA-GBA agreement.

FIRST CAUSE OF ACTION
(Breach of Contract)

18. Plaintiff incorporates the allegations of paragraphs 1 through 17 of the complaint by reference as though fully set forth herein.

19. The MCA-GBA agreement remained in force and was [p. 6] respected by both parties from January 20, 1994 until June of 1995 when two of GBA's members (R.L. Peterson Co. and Design Mechanical) submitted the written notice of intent to change to MCA effective on the next anniversary date (July 1, 1995) as authorized by the MCA-GBA agreement. GBA notified both of the affected unions (U.A. Locals 467 and 393) in writing that it did not agree to the transfer and directed the administrator that all fund contributions from those two employers were to continue to be paid to GBA.

20. Upon being notified by the unions and the administrator that GBA was objecting to the switch of associations, MCA's Executive Vice-president (Scott Strawbridge) contacted GBA's new President (Frank Park) to inquire regarding GBA's intentions. Park responded that both contractors were still members of GBA and that GBA did not recognize the transfer as valid. Because payment of the contributions from the unions were not due until August 15, Strawbridge agreed to give GBA until August 9 to consult with legal counsel before taking any action.

21. On August 9, 1995, Park orally notified Strawbridge that GBA's Board of Directors had consulted with counsel and it was still their position that the two contractors were members of GBA and that GBA would not accept the transfer. GBA notified the trust administrator of its position refusing to honor the transfer and demanded that "funds" from Peterson Co. and Design Mechanical continue to be paid to GBA and not to MCA.

22. By refusing to honor the transfer to MCA of former members Peterson Co. and Design Mechanical, despite their [p. 7] compliance with the conditions for such transfer as set forth in the MCA-GBA agreement, GBA has materially breached the MCA-GBA agreement. GBA's breaches of the MCA-GBA agreement are ongoing as Peterson Co. and Design Mechanical continue to pay funds to the trust administrator who, despite Peterson Co.'s and Design Mechanical's compliance with the conditions for transfer of associations set forth in the MCA-GBA agreement, continues to pay the "funds" from those two contractors to GBA not MCA.

23. As a proximate result of GBA's breach of the MCA-GBA agreement, MCA has been damaged in an amount to be proven at trial. MCA will continue to suffer additional damages as GBA continues to interfere with MCA's right to additional "funds" paid by Peterson & Co. and Design Mechanical (and any other member who wishes to transfer to MCA) to the trust administrator.

24. Because the sums owing to MCA by virtue of GBA's breach of the MCA-GBA agreement are capable of being made certain by calculation, and because MCA's right to such "funds" vested at an ascertainable time,

MCA is entitled to prejudgment interest on all "funds" found owing at the legal rate under Civil code section 3287(a).

SECOND CAUSE OF ACTION
(Declaratory Judgment)

25. Plaintiff incorporates the allegations of paragraphs 1 through 21 of the complaint by reference as though fully set forth herein.

26. While MCA contends that the MCA-GBA agreement is a legally binding and enforceable contract, GBA now contends that [p. 8] the January 7, 1994 letter " . . . is ineffective to defeat the explicit terms of the collective bargaining agreement because the letter was not entered into by the parties to the collective bargaining agreements, it is not supported by adequate consideration, and it was not intended to pertain to the term of the current collective bargaining agreements." Attached hereto as Exhibit "C" is a true and correct copy of GBA's counsel's letter setting forth GBA's position.

27. MCA submits that none of GBA's arguments have merit. First, as alleged in paragraph 9, *supra*, the other "party" to the collective bargaining agreements (the unions) agreed **in advance** that it would accept whatever agreement MCA and GBA could reach between themselves. Second, the $5,000 payment to GBA which MCA had no "prior duty" to make clearly constituted "consideration" for the MCA-GBA agreement. Alternatively, consideration is not required for the agreement under the doctrine of promissory estoppel because MCA reasonably relied to its detriment, as alleged in paragraph 16, *supra*,

upon GBA's promise to honor the MCA-GBA agreement. Third, at the time of execution of the MCA-GBA agreement it was interpreted by both MCA and GBA to apply to the current collective bargaining agreements (including the 1994 contract extensions) and MCA has relied to its detriment upon such interpretation as alleged hereinabove. Accordingly, GBA is now estopped from asserting a new and different interpretation.

28. An actual controversy has arisen between MCA and GBA over the enforceability and terms of the MCA-GBA agreement.

29. Accordingly, MCA requests that this Court enter a [p. 9] Declaratory Judgment that: (1) the unions have waived the provision in the collective bargaining agreements requiring all modification to be in a writing signed by a duly authorized representative of the unions; (2) the MCA-GBA agreement is supported by consideration or, in the alternative, none is required under the doctrine of promissory estoppel; and (3) the MCA-GBA agreement became effective upon the date of execution by GBA and applies to all collective bargaining agreements (including the 1994 contract extensions) to which GBA was a party on the date of execution of the MCA-GBA agreement.

WHEREFORE, MCA prays for judgment against GBA as follows:

On First Cause of Action:

1. Compensatory damages according to proof: and
2. Costs of suit herein incurred: and

3. Such other and further relief as the Court deems just and proper.

On Second Cause of Action:

1. A Declaratory Judgment that: (A) the MCA-GBA agreement is a binding and enforceable contract and (B) the MCA-GBA agreement applies to all collective bargaining agreements to which GBA was a party on the date of execution of the MCA-GBA agreement.

Dated: October 24, 1995

CARTER & CARTER

By: /s/ Brian M. Carter
Brian M. Carter
Attorneys for Plaintiff

[p. 10] **EXHIBIT A**

[p. 11] **MECHANICAL CONTRACTORS ASSOCIATION OF NORTHERN CALIFORNIA**

940 Adams, Suite F
Benicia, CA 94510
(800) 640-5152
(707) 746-6484
FAX (707) 746-5384

[LOGO] [LOGO]

7 January 1994

Ron Peterson, President
GBA
c/o R. L. Peterson Company
P.O. Box 2267
Menlo Park, CA 94026

Dear Ron:

As a follow up to our December luncheon and subsequent phone calls, MCA would like to offer the following:

* MCA has attached a check for $5,000 made out to GBA.

* GBA may cash if the following is agreed to:

1) GBA writes CPMCA and relinquishes its claim to its "*seed money*" and informs CPMCA that MCA has taken GBA's position for "*seed money.*" It will then be up to MCA and CPMCA to work out details as to the disposition of that "*seed money.*"

2) The dispute between MCA and GBA is settled concerning the representation and employer trust funds of Madlem Mechanical and Thermal Mechanical.

3) Per our luncheon discussion, MCA would like to establish the following procedure to avoid any future such problems:

> It is agreed between MCA and GBA that no signatory contractors may switch Associations without notifying their respective Associations in writing and that switch (as far as employer trust funds) is made on next the anniversary date of the collective bargaining agreement; i.e., a signatory contractor from MCA who wishes to become signatory with GBA would notify MCA that he wishes to switch in writing. Currently the agreements in Local 467 and Local 393 have an anniversary date of July 1 each year. Hours starting on the next July 1 could be switched to the new Association.
>
> [p. 12] Ron I hope this settlement, without prejudice, is acceptable to GBA. We see it as a win-win situation.
>
> * GBA get its $5,000 seed money back immediately versus waiting for the March CPMCA Board Meeting and then the seed money may only be returned in the progress payments.
>
> * The dispute between MCA and GBA is over.
>
> * A procedure for the future is established.

If the above settlement is acceptable, please have the GBA Board authorize you to initial this letter and the check can be cashed. If it is not acceptable, please return the check.

Thank you for your help and please feel free to contact me if you have any questions.

Sincerely,

/s/ Scott
Scott W. Strawbridge
Executive Vice President

SS:nw

Enclosure

cc: MCA Board
Jim Carter

R

[p. 13] **EXHIBIT B**

[p. 14] [LOGO]

Greater Bay Area Association of
Plumbing and Mechanical Contractors, Inc.

2672 Bayshore Parkway - Suite 531
Mountain View, CA 94043
Telephone: (415) 965-0100 • Fax: (415) 965-0111

January 20, 1994

Elaine J. Rose
CPMCA
50 Fullerton Ct., Ste. 201
Sacramento, CA 95825

Dear Elaine:

GBA would like to relinquish our claim to the "seed money." MCA has taken GBA's position for the "seed money."

We wish you much good luck at CPMCA and look forward to seeing you at the Western Mechanical Conference in March, 1994.

Thank you for the invitation to re-join CPMCA should we once again change our minds.

Sincerely,

/s/ Norma
Norma Y. Singer
Executive Director

NYS:as

cc: Scott Strawbridge
MCA

[p. 15] **EXHIBIT C**

[p. 16] Littler, Mendelson, Fastiff, Tichy & Mathiason
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
650 CALIFORNIA STREET, 20TH FLOOR
SAN FRANCISCO, CALIFORNIA 94108-2693
(415) 433-1940
FAX (415) 399-8490

[Letterhead Omitted In Printing]

September 25, 1995

WRITER'S DIRECT DIAL
(415)399-8447
WRITER'S DIRECT FAX

James A. Carter, Esq.
Carter & Carter
425 California Street, 19th Floor
San Francisco, California 94104

RE: Greater Bay Area Association Of Plumbing & Mechanical Contractors, Inc./MCA

Dear Jim:

Since writing to you on August 28, 1995, I have had a chance to meet with representatives of GBA.

As stated in my earlier letter, it is GBA's position that the collective bargaining agreements which require payments to GBA on behalf of the entities which were members of GBA at the inception of the current contracts are controlling, and that GBA continues, therefore, to be entitled to Fund contributions from those companies. Additionally, the January 7, 1994, letter is ineffective to defeat the explicit terms of the collective bargaining agreements because the letter was not entered into by the parties to the collective bargaining agreements, it is not supported by adequate consideration, and it was not intended to pertain to the term of the current collective bargaining agreements.

Very truly yours,

/s/ George
GEORGE J. TICHY, II

GJT:lm
JMS;497.95; lm

[p. 17] **GEORGE J. TICHY, II CSB, 941146**
JOHN M. SKONBERG, CSB 069409
DANIEL A. CROLEY, CSB 154386
LITTLER, MENDELSON, FASTIFF, TICHY & MATHIASON
A Professional Corporation
650 California Street, 20th Floor
San Francisco, California 94108-2693
Telephone: (415) 433-1940

Attorneys for Defendant
GREATER BAY AREA ASSOCIATION OF PLUMBING AND MECHANICAL CONTRACTORS

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN MATEO

MECHANICAL CONTRACTORS ASSOCIATION OF NORTHERN CALIFORNIA, a CALIFORNIA CORPORATION, Plaintiff, v. **GREATER BAY AREA ASSOCIATION OF PLUMBING AND MECHANICAL CONTRACTORS, a CALIFORNIA CORPORATION,** Defendant.	**Case No. 394184** **DEFENDANT GREATER BAY AREA ASSOCIATION OF PLUMBING AND MECHANICAL CONTRACTORS ANSWER TO UNVERIFIED COMPLAINT** (Filed Nov. 27, 1995)

[p. 18] Defendant Greater Bay Area Association of Plumbing and Mechanical Contractors ("Defendant") answers the unverified Complaint of Mechanical Contractors Association of Northern California ("Plaintiff") as follows:

I

GENERAL DENIAL

1. Defendant generally denies each and every allegation of Plaintiff's unverified Complaint.

II

AFFIRMATIVE DEFENSES

As separate and distinct affirmative defenses to Plaintiff's Complaint, and alleged causes of action, and each of them, Defendant alleges as follows:

FIRST AFFIRMATIVE DEFENSE

1. Plaintiff's Complaint and alleged causes of action, and each of them, fail to state facts sufficient to constitute a cause of action against Defendant.

SECOND AFFIRMATIVE DEFENSE

2. Plaintiff's claims are preempted in whole or in part by the National Labor Relations Act (the "NLRA"), including without limitation, section 8(d) of the NLRA. 29 U.S.C. § 141, *et seq.*

THIRD AFFIRMATIVE DEFENSE

3. Plaintiff's Complaint and causes of action, and each of them, alleges an agreement which is unlawful under the NLRA, including without limitation, section 8(d) of the NLRA; thus, the agreement is void under Civil Code sections 1608 and 1667. 29 U.S.C. § 141, *et seq.*

[p. 19] FOURTH AFFIRMATIVE DEFENSE

4. Plaintiff's Complaint and causes of action, and each of them, are barred by, or the relief Plaintiff seeks is unavailable under, the principle of Mistake of Fact.

FIFTH AFFIRMATIVE DEFENSE

5. Defendant is informed and believes and thereon alleges that Plaintiff has failed to avoid or minimize any and all damages which are alleged to have been caused by Defendant, and Defendant's liability to Plaintiff, if any, should be denied or reduced accordingly.

SIXTH AFFIRMATIVE DEFENSE

6. Plaintiff's Complaint and causes of action, and each of them, are barred, or the relief Plaintiff seeks is unavailable, in whole or in part by Plaintiff's fraudulent misrepresentations and/or omissions.

SEVENTH AFFIRMATIVE DEFENSE

7. Plaintiff's Complaint and causes of action, and each of them are barred by, or the relief which Plaintiff seeks is unavailable under, the doctrine of estoppel.

EIGHTH AFFIRMATIVE DEFENSE

8. Plaintiff's Complaint and causes of action, and each of them, are bared or excused by Plaintiff's failure of performance.

NINTH AFFIRMATIVE DEFENSE

9. Plaintiff's Complaint and alleged causes of action, and each of them, fail to state a claim against Defendant because Local 393 and/or Local 467 are not parties to the agreement(s) and/or contract modification(s) alleged.

[p. 20] TENTH AFFIRMATIVE DEFENSE

10. Plaintiff's Complaint and causes of action, and each of them, fail against Defendant because the agreement(s) alleged was not authorized or ratified in whole or in part by Defendant.

ELEVENTH AFFIRMATIVE DEFENSE

11. Plaintiff's Complaint and causes of action, and each of them, fail against Defendant because the agreement(s) alleged is not supported in whole or in part by adequate consideration.

TWELFTH AFFIRMATIVE DEFENSE

12. Plaintiff's Complaint and causes of action, and each of them, fail against Defendant because the alleged entry into the alleged agreement(s) is an ultra vires act.

WHEREFORE, Defendant prays for judgment as follows:

1. That Plaintiff take nothing by its Complaint.

2. For its costs incurred herein; and

3. For such other and further relief as the Court may deem just and proper.

Dated: November 27, 1995

LITTLER, MENDELSON, FASTIFF,
TICHY & MATHIASON
A Professional Corporation
GEORGE J. TICHY, II
JOHN M. SKONBERG
DANIEL A. CROLEY

By: /s/ Daniel A. Croley
DANIEL A CROLEY

Attorneys For Defendant
GREATER BAY AREA ASSOCIATION
OF PLUMBING AND MECHANICAL
CONTRACTORS

[p. 21] PROOF OF SERVICE BY MAIL

I, GLORIA M. DUNLAP, hereby declare and state:

I am over the age of eighteen years, employed in the City and County of San Francisco, California, and not a party to the within action. My business address is 650 California Street, 20th Floor, San Francisco, California 94108-2693.

On November 27, 1995, I served the following: **DEFENDANT GREATER BAY AREA ASSOCIATION**

OF PLUMBING AND MECHANICAL CONTRACTORS ANSWER TO UNVERIFIED COMPLAINT on the following in said cause by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States Postal Service mail at San Francisco, California addressed as follows:

James A. Carter, Esq.
Brian M. Carter, Esq.
CARTER & CARTER
425 California Street, 19th Floor
San Francisco, CA 94104

I am readily familiar with the Firm's practice for collection and processing of correspondence for mailing with the United States Postal Service. The envelope(s) above was sealed and placed for collection by the Firm's messengers and will be deposited today with the United States Postal Service in the ordinary course of business.

I declare under penalty of perjury that the foregoing is true and correct. Executed on November 27, 1995 at San Francisco, California.

/s/ Gloria M. Dunlap
GLORIA M. DUNLAP

[p. 22] SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN MATEO

JUDGE DEPT. NO. 05
DEPUTY CLERK L. SANDBURG
HONORABLE V. GENE MCDONALD

CASE NO.: 000394184
COURT REPORTER B. GEE

DATE: 05 MAR 1996

TITLE OF ACTION:
MECHANICAL CONTRACTORS ASSOC OF NO CALIF., VS. GREATER BAY AREA ASSOC. OF PLUMBING & MECHANICAL CONTRACTORS, ETC.

NATURE OF EVENTS:
CASE MANAGEMENT CONFERENCE

James A. Carter for Plaintiff APPEARANCE

Daniel Croley for Defendant APPEARANCE

[ ] OFF CALENDAR [ ] NON APPEARANCE BY PARTIES. Shiela Illegible, Illegible

✓ ~~UNREPORTED~~ CONFERENCE HELD ~~IN CHAMBERS~~ WITH ~~THE COURT~~ (AND ABOVE COUNSEL) (~~AND PLAINTIFF/DEFENDANT) (AND~~ ___

___ THIS CASE HAS BEEN DISMISSED. SEE ATTACHMENT.

✓ THIS MATTER IS CONTINUED FOR FURTHER ~~SETTLEMENT~~/CASE MANAGEMENT CONFERENCE IN DEPT. 5 ON June 5, 1996 AT 9:00 A.M./~~P.M.~~

[ ] THIS CASE IS DEEMED AT-ISSUE AND: _____ SENT TO ARBITRATION (JUDICIAL/BINDING); _____ SET FOR TRIAL: _____

[ ] SETTLEMENT CONFERENCE: _____ TO BE ASSIGNED _____ MAY BE ASSIGNED _____ REASSIGNED

[ ] DISMISSAL – ENTIRE ACTION AS TO _____ WAS ENTERED ON _____.

[ ] THE CASE IS EXCEPTED FROM THE CASE MANAGEMENT GUIDELINES BECAUSE: _____

[ ] THIS CASE IS TRANSFERRED TO _____ . _____ TO PAY FOR COSTS OF TRANSFER.

[ ] THIS CASE IS SETTLED FOR _______________

[ ] THE CASE IS DESIGNATED AS AN UNINSURED MOTORIST ARBITRATION CASE UNDER CALIFORNIA RULES OF COURT NO. 2103(C) AND CONTINUED TO _________________________

IN DEPT. _____ AT _ A.M./P.M. FOR REVIEW.

[ ] THIS MATTER IS SET FOR A HEARING ON AN ORDER TO SHOW CAUSE RE: CASE MANAGEMENT CONFERENCE IN DEPT. _____ ON ____

AT _____ A.M./P.M.

[ ] OTHER ORDERS MADE: ___________________

[ ] LET A WRITTEN ORDER BE PREPARED, SIGNED AND FILED. __________ TO PREPARE ORDER.

DATE: 3-5-96

NATURE OF PROCEEDINGS: ___________________

CASE MANAGEMENT CONFERENCE MINUTE FOR

____

[p. 23] **GEORGE J. TICHY, II CSB, 941146**
JOHN M. SKONBERG, CSB 069409
DANIEL A. CROLEY, CSB 154386
LITTLER, MENDELSON, FASTIFF,
TICHY & MATHIASON
A Professional Corporation
650 California Street, 20th Floor
San Francisco, California 94108-2693
Telephone: (415) 433-1940

Attorneys for Defendant
GREATER BAY AREA ASSOCIATION OF
PLUMBING AND MECHANICAL
CONTRACTORS

IN THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN MATEO

MECHANICAL CONTRACTORS ASSOCIATION OF NORTHERN CALIFORNIA, a CALIFORNIA CORPORATION,

Plaintiff,

v.

GREATER BAY AREA ASSOCIATION OF PLUMBING AND MECHANICAL CONTRACTORS, a CALIFORNIA CORPORATION,

Defendant.

Case No. 394184

DEFENDANT GREATER BAY AREA ASSOCIATION OF PLUMBING AND MECHANICAL CONTRACTORS FIRST AMENDED ANSWER TO UNVERIFIED COMPLAINT

(Filed Apr. 19, 1996)

[p. 24] Defendant Greater Bay Area Association of Plumbing and Mechanical Contractors ("Defendant") answers the unverified Complaint of Mechanical Contractors Association of Northern California ("Plaintiff") as follows:

I

GENERAL DENIAL

1. Defendant generally denies each and every allegation of Plaintiff's unverified Complaint.

II

AFFIRMATIVE DEFENSES

As separate and distinct affirmative defenses to Plaintiff's Complaint, and alleged causes of action, and each of them, Defendant alleges as follows:

FIRST AFFIRMATIVE DEFENSE

1. Plaintiff's Complaint and alleged causes of action and each of them, fail to state facts sufficient to constitute cause of action against Defendant.

SECOND AFFIRMATIVE DEFENSE

2. Plaintiff's claims are preempted in whole or in part by the National Labor Relations Act (the "NLRA"), including without limitation, section 8(d) of the NLRA. 29 U.S.C. § 141, *et seq*.

THIRD AFFIRMATIVE DEFENSE

3. Plaintiff's Complaint and causes of action, and each of them, alleges an agreement which is unlawful under the NLRA including without limitation, section 8(d) of the NLRA; thus, the agreement is void under Civil Code sections 1608 and 1667. 29 U.S.C. § 141, *et seq.*

[p. 25] FOURTH AFFIRMATIVE DEFENSE

4. Paintiff's Complaint and causes of action, and each of them, are barred by, or the relief Plaintiff seeks is unavailable under, the principle of Mistake of Fact.

FIFTH AFFIRMATIVE DEFENSE

5. Defendant is informed and believes and thereon alleges that Plaintiff has failed to avoid or minimize any and all damages which are alleged to have been caused by Defendant, and Defendant's liability to Plaintiff, if any, should be denied or reduced accordingly.

SIXTH AFFIRMATIVE DEFENSE

6. Plaintiff's Complaint and causes of action, and each of them, are barred, or the relief Plaintiff seeks is unavailable in whole or in part by Plaintiff's fraudulent misrepresentation and/or omissions.

SEVENTH AFFIRMATIVE DEFENSE

7. Plaintiff's Complaint and causes of action, and each of them are barred by, or the relief which Plaintiff seeks is unavailable under, the doctrine of estoppel.

EIGHTH AFFIRMATIVE DEFENSE

8. Plaintiff's Complaint and causes of action, and each of them, are bared or excused by Plaintiff's failure of performance.

NINTH AFFIRMATIVE DEFENSE

9. Plaintiff's Complaint and alleged causes of action and each of them, fail to state a claim against Defendant because Local 393 and/or Local 467 are not parties to the agreement(s) and/or contract modification(s) alleged.

[p. 26] TENTH AFFIRMATIVE DEFENSE

10. Plaintiff's Complaint and causes of action, and each of them, fail against Defendant because the agreement(s) alleged was not authorized or ratified in whole or in part by Defendant.

ELEVENTH AFFIRMATIVE DEFENSE

11. Plaintiff's Complaint and causes of action, and each of them, fail against Defendant because the agreement(s) alleged is not supported in whole or in part by adequate consideration.

TWELFTH AFFIRMATIVE DEFENSE

12. Plaintiff's Complaint and causes of action, and each of them, fail against Defendant because the alleged entry into the alleged agreement(s) is an ultra vires act.

THIRTEENTH AFFIRMATIVE DEFENSE

13. From approximately September 1992, and continuing to the present, Plaintiff has been indebefed to Defendant in an amount to be determined at trial. This indebtedness arose by virtue of contract administration funds which were due to Defendant but were paid to Plaintiff. This whole amount is unpaid and now due and together with interest thereon at the applicable rate, must be set off against any amount awarded to Plaintiff in this action under California Code of Civil Code of Civil Procedure section 431.7 and/or any equitable right of recoupment and/or set off.

WHEREFORE, Defendant prays for judgment as follows:

1. That Plaintiff take nothing by its Complaint.

2. For its costs incurred herein.

[p. 27] 3. That the amount of Defendant's claim against Plaintiff, together with interest at the applicable rate, be set off against any amount awarded to Plaintiff in this action.

4. For such other and further relief as the Court may deem just and proper.

Dated: April 3, 1996

LITTLER, MENDELSON, FASTIFF,
TICHY & MATHIASON
A Professional Corporation
GEORGE J. TICHY, II
JOHN M. SKONBERG
DANIEL A. CROLEY

By: /s/ Daniel A. Croley
DANIEL A CROLEY

Attorneys For Defendant
GREATER BAY AREA
ASSOCIATION
OF PLUMBING AND
MECHANICAL
CONTRACTORS

[p. 28] PROOF OF SERVICE

(Filed Apr. 19, 1996)

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is Littler, Mendelson, Fastiff, Tichy & Mathiason, 650 California Street, 20th Floor, San Francisco, California 94108-2693. On April 3, 1996, I served the within document(s):

DEFENDANT GREATER BAY AREA ASSOCIATION OF PLUMBING AND MECHANICAL CONTRACTORS FIRST AMENDED ANSWER TO UNVERIFIED COMPLAINT

[ ] by facsimile transmission at or about ________ on that date. This document was transmitted by using a facsimile machine that complies with California Rules of Court Rule 2003(3), telephone number (415) 399-8490. The transmission was reported as complete and without error. A copy of the transmission report, properly issued by the transmitting machine, is attached. The names and facsimile numbers of the person(s) served are as set forth below.

[x] by placing a true copy of the document(s) listed above for collection and mailing following the firm's

ordinary business practice in a sealed envelope with postage thereon fully prepaid for deposit in the United States mail at San Francisco, California addressed as set forth below.

[ ] by depositing a true copy of the same enclosed in a sealed envelope, with delivery fees provided for, in a Federal Express pick up box or office designated for overnight delivery, and addressed as set forth below.

[ ] by personally delivering a copy of the document(s) listed above to the person(s) at the address(es) set forth below.

James A. Carter, Esq.
Brian M. Carter, Esq.
CARTER & CARTER
425 California Street
19th Floor
San Francisco, CA 94104

[p. 29] I am readily familiar with the firm's practice of collecting and processing correspondence for mailing and for shipping via Federal Express. Under that practice it would be deposited with the U.S. Postal Service or if a Federal Express shipment, deposited in a Federal Express pick-up box or office on the same day with postage or fees thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on April 3, 1996 at San Francisco, California.

/s/ Gloria M. Dunlap
GLORIA M. DUNLAP

[p. 30] **GEORGE J. TICHY, II CSB, 941146**
JOHN M. SKONBERG, CSB 069409
DANIEL A. CROLEY, CSB 154386
LITTLER, MENDELSON, FASTIFF,
TICHY & MATHIASON
A Professional Corporation
650 California Street, 20th Floor
San Francisco, California 94108-2693
Telephone: (415) 433-1940

Attorneys for Defendant
GREATER BAY AREA ASSOCIATION OF
PLUMBING AND MECHANICAL
CONTRACTORS

IN THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN MATEO

MECHANICAL CONTRACTORS) **Case No. 394184**
ASSOCIATION OF NORTHERN)
CALIFORNIA, a CALIFORNIA) **STIPULATION**
CORPORATION,) **AND ORDER**
)
Plaintiff,)
) (Filed Apr. 19, 1996)
v.)
)
GREATER BAY AREA)
ASSOCIATION OF PLUMBING)
AND MECHANICAL)
CONTRACTORS, a)
CALIFORNIA CORPORATION,)
)
Defendant.)
)

[p. 31] Plaintiff Mechanical Contractors Association of Northern California ("MCA") and Defendant Greater

Bay Area Association of Plumbing and Mechanical Contractors ("GBA") stipulate as follows:

1. GBA will file and serve upon MCA's counsel by mail the FIRST AMENDED ANSWER TO UNVERIFIED COMPLAINT, a copy of which is attached as Exhibit A.

MECHANICAL CONTRACTORS
ASSOCIATION OF
NORTHERN CALIFORNIA

DATED: March 29, 1996 BY: /s/ James Carter
JAMES CARTER

of **CARTER AND CARTER**

GREATER BAY AREA
ASSOCIATION OF
PLUMBING AND MECHANICAL
CONTRACTORS

DATED: March 25, 1996 BY: /s/ Daniel A. Croley
DANIEL A. CROLEY

of **LITTLER, MENDELSON, FASTIFF,**
TICHY & MATHIASON
A Professional Corporation

IT IS SO ORDERED based on the parties above-referenced Stipulation.

DATED: APR 18 1996 /s/ Illegible
JUDGE OF THE
SUPERIOR COURT

[p. 32] PROOF OF SERVICE

(Filed Apr. 19, 1996)

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is Littler, Mendelson, Fastiff, Tichy & Mathiason, 650 California Street, 20th Floor, San Francisco, California 94108-2693. On April 3, 1996, I served the within document(s):

STIPULATION AND ORDER

_ by facsimile transmission at or about ________ on that date. This document was transmitted by using a facsimile machine that complies with California Rules of Court Rule 2003(3), telephone number (415) 399-8490. The transmission was reported as complete and without error. A copy of the transmission report, properly issued by the transmitting machine, is attached. The names and facsimile numbers of the person(s) served are as set forth below.

X by placing the true copy of the document(s) listed above for collection and mailing following the firm's ordinary business practice in a sealed envelope with postage thereon fully prepaid for deposit in the United States mail at San Francisco, California addressed as set forth below.

_ by depositing a true copy of the same enclosed in a sealed envelope, with delivery fees provided for, in a Federal Express pick up box or office designated for overnight delivery, and addressed as set forth below.

_ by personally delivering a copy of the document(s) listed above to the person(s) at the address(es) set forth below.

James A. Carter, Esq.
Brian M. Carter, Esq.
CARTER & CARTER
425 California Street
19th Floor
San Francisco, CA 94104

I am readily familiar with the firm's practice of collecting and processing correspondence for mailing and for shipping via [p. 33] Federal Express. Under that practice it would be deposited with the U.S. Postal Service or if a Federal Express shipment, deposited in a Federal Express pick-up box or office on the same day with postage or fees thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on April 3, 1996 at San Francisco, California.

/s/ Gloria M. Dunlap
GLORIA M. DUNLAP

[p. 34] SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN MATEO

JUDGE DEPT. NO. 03
DEPUTY CLERK RUTH DEMOSS
HONORABLE ARAM SERVERIAN

CASE NO.: 000394184
COURT REPORTER E. GEE

DATE: 05 JUN 1996

TITLE OF ACTION:
MECHANICAL CONTRACTORS ASSOC OF NO CALIF., VS. GREATER BAY

NATURE OF EVENTS:
CASE MANAGEMENT CONFERENCE ___ (3/5)

Brian Carter for Plaintiff APPEARANCES

Daniel A. Croley for Defendant APPEARANCES

[ ] OFF CALENDAR [ ] NON APPEARANCE BY PARTIES.

___ UNREPORTED CONFERENCE HELD IN CHAMBERS WITH THE COURT (AND ABOVE COUNSEL) (AND PLAINTIFF/DEFENDANT) (AND _______ .

___ THIS CASE HAS BEEN DISMISSED. SEE ATTACHMENT.

___ THIS MATTER IS CONTINUED FOR FURTHER SETTLEMENT/CASE MANAGEMENT CONFERENCE IN DEPT. _______ ON _______ AT _______ A.M./P.M.

✓ THIS CASE IS DEEMED AT-ISSUE AND: _____ SENT TO ARBITRATION (JUDICIAL/BINDING); ✓ SET FOR TRIAL: January 1997

[ ] SETTLEMENT CONFERENCE: [ ] TO BE ASSIGNED [ ] MAY BE ASSIGNED [ ] REASSIGED

[ ] DISMISSAL – ENTIRE ACTION AS TO _____ WAS ENTERED ON _____.

[ ] THE CASE IS EXCEPTED FROM THE CASE MANAGEMENT GUIDELINES BECAUSE: _____

[ ] THIS CASE IS TRANSFERRED TO _____ . _____ TO PAY FOR COSTS OF TRANSFER.

[ ] THIS CASE IS SETTLED FOR _______________

[ ] THE CASE IS DESIGNATED AS AN UNINSURED MOTORIST ARBITRATION CASE UNDER CALIFORNIA RULES OF COURT NO. 2103(C) AND CONTINUED TO ________________________

IN DEPT. _____ AT _ A.M./P.M. FOR REVIEW.

[ ] THIS MATTER IS SET FOR A HEARING ON AN ORDER TO SHOW CAUSE RE: CASE MANAGEMENT CONFERENCE IN DEPT. _____ ON ____

AT _____ A.M./P.M.

[ ] OTHER ORDERS MADE: __________________

[ ] LET A WRITTEN ORDER BE PREPARED, SIGNED AND FILED. __________ TO PREPARE ORDER.

DATE: June 5, 1996

NATURE OF PROCEEDINGS: ____________________

CMC CNS

CASE MANAGEMENT CONFERENCE MINUTE FORM

[p. 35] JAMES A. CARTER (CBN 33119)
BRIAN M. CARTER (CBN 132710)
CARTER & CARTER
425 California Street, 19th Floor
San Francisco, CA 94104-2204
Telephone: (415) 989-4800

Attorneys for Plaintiff
MECHANICAL CONTRACTORS ASSOCIATION
OF NORTHERN CALIFORNIA

IN THE SUPERIOR COURT OF CALIFORNIA

FOR THE COUNTY OF SAN MATEO

MECHANICAL CONTRACTORS)
ASSOCIATION OF NORTHERN)
CALIFORNIA, a California)
corporation,) Case No. 394184
)
Plaintiff,)
) INDEX TO
v.) DECLARATIONS
) AND EXHIBITS IN
GREATER BAY AREA) SUPPORT OF
ASSOCIATION OF PLUMBING) MOTION FOR
AND MECHANICAL) SUMMARY
CONTRACTORS, a California) ADJUDICATION
corporation,)
)
Defendant.)
______________________________)

1. Declaration of Scott Strawbridge 1

A. MCA's Offer Letter to GBA, Exhibit "A"... 6

B. Ron Peterson's Initialized Letter in Response, Exhibit "B" 8

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B. Relevant Portions of Deposition of Frank Park, Exhibit "B" 3

4. Declaration of Gary Saunders 1

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[p. 37] **EXHIBIT 1**

[p. 38] JAMES A. CARTER (CBN 33119)
BRIAN M. CARTER (CBN 132710)
CARTER & CARTER
425 California Street, 19th Floor
San Francisco, CA 94104-2204
Telephone: (415) 989-4800

Attorneys for Plaintiff
MECHANICAL CONTRACTORS ASSOCIATION
OF NORTHERN CALIFORNIA

IN THE SUPERIOR COURT OF CALIFORNIA

FOR THE COUNTY OF SAN MATEO

MECHANICAL CONTRACTORS ASSOCIATION OF NORTHERN CALIFORNIA, a California corporation, Plaintiff, v. GREATER BAY AREA ASSOCIATION OF PLUMBING AND MECHANICAL CONTRACTORS, a California corporation, Defendant.	Case No. 398184 DECLARATION OF SCOTT STRAWBRIDGE IN SUPPORT OF MOTION FOR SUMMARY ADJUDICATION

I, SCOTT STRAWBRIDGE, have personal knowledge of the foregoing and, if called as a witness, could and would testify as follows:

1. I am the executive vice-president of Plaintiff MECHANICAL CONTRACTORS ASSOCIATION OF

NORTHERN CALIFORNIA (hereafter "MCA") and held that position at all times relevant herein. MCA is a California corporation doing business as an association of licensed mechanical and plumbing contractors which acts as collective bargaining agent on behalf of its members. MCA's principal place of business is in the County of Contra Costa, State of California.

2. Defendant GREATER BAY AREA ASSOCIATION OF PLUMBING AND MECHANICAL CONTRACTORS (hereafter "GBA") is a California corporation doing business as an association of mechanical and plumbing contractors with its principal place of business in [p. 39] the State of California, County of San Mateo.

3. MCA and GBA are competitors, to wit, each acts as bargaining agent for its members in conjunction with the applicable unions for purposes of both the negotiations leading to collective bargaining agreements and the administration of those agreements.

4. Both GBA and MCA are parties to separate collective bargaining agreements (on behalf of their constituent members) with various unions under which both MCA's and GBA's members perform contracting services. Those collective bargaining agreements provide for the payment of contract administration and industry funds ("funds") which are monies earned by the respective associations for all work performed by union members under the collective bargaining agreements to which that association is signatory. Under the provisions of these collective bargaining agreements, "funds" are initially paid by the member contractor to a trust administrator

which then distributes them to the appropriate association.

5. During 1993, certain disputes arose between MCA and GBA concerning the ability of contractor-members to change associations while the applicable collective bargaining agreement remained in force, and the allocation of "funds" paid by those members after they changed associations.

6. Prior to the disputes between MCA and GBA referred to in paragraph 5, *supra,* both MCA and GBA had joined a newly formed statewide association of contractors, the "CPMCA". GBA had contributed $5,000 of "seed money" to CPMCA[1] while MCA had not contributed any "seed money". GBA subsequently changed its mind and decided to withdraw from CPMCA. Because of a shortage of cash, CPMCA was unable to immediately refund GBA's "seed money".

7. In an effort to resolve their disputes and avoid litigation, representatives of MCA (including myself) and GBA (including the President of each association) met in December of 1993. At that meeting, I stated that MCA had a proposal for resolving the disputes which I would put into writing and present for GBA's consideration. By letter dated January 7, 1994, I wrote to [p. 40] GBA's then president (Ron Peterson) and proposed an agreement with GBA whereby: (1) MCA would give GBA $5,000

---

[1] "CPMCA" refers to the California Plumbing and Mechanical Contractors Association, a statewide association of plumbing and mechanical contractors based in Sacramento which is not related, connected or affiliated with either MCA or GBA.

immediately in exchange for an assignment of GBA's right to recoup its "seed money" from CPMCA; (2) the disputes between MCA and GBA were deemed resolved; and (3) to avoid repetitions of the disputes in the future, both associations would agree that their rights to "funds" paid under the relevant collective bargaining agreements be modified by a new agreement which provided that either association's members could switch its affiliation to the other association by giving written notice to both associations, the change to be effective on the anniversary date of the applicable collective bargaining agreement (July 1), and that "funds" which were earned after the effective date of the association change would be paid to the member's new association.

8. While I knew that the modification of a provision in the collective bargaining agreements proposed by MCA's offer would require the consent of the affected unions (who were signatory to those agreements), I had discussed that issue with the two involved unions prior to sending the proposal to GBA. In response to my queries concerning the unions' position on the issue, the business managers for both of the affected unions (Gary Saunders of U.A. Local 467 and Loyd Williams of U.A. Local 393) stated that they did not want to become involved in the disputes between MCA and GBA. Both Saunders and Williams stated to me that their respective unions would accept whatever agreement was reached by MCA and GBA with respect to members who wished to change associations and had no objection to modification of the provision in the collective bargaining agreements which specified the association representing each contractor and the association which was entitled to receive

contract administration funds from each contractor. *See* Declarations of Gary Saunders and Loyd Williams in Support of Motion for Summary Adjudication.

9. After formalizing my idea for resolving the disputes proposal into a written offer (my letter dated January 7, 1994) I mailed that letter, along with a check for the $5,000 made out to GBA, to GBA's President, Ron Peterson. The offer, by its terms, was to be accepted by Peterson initialing the letter (as confirmation of GBA's acceptance of the proposal) after getting authorization from GBA's Board of Directors and/or cashing the enclosed check. The offer also [p. 41] explicitly stated that GBA was to return the check if it did not accept the offer. A true and correct copy of this offer is attached hereto as Exhibit "A".

10. Several days later, Peterson told me by telephone that he would present the offer to GBA's Board of Directors for approval.

11. On or about January 20, 1994, GBA's President Ron Peterson initialed the letter and returned it to MCA, manifesting GBA's acceptance of the offer. A true and correct copy of this letter executed by Ron Petersen as GBA's President, is attached hereto as Exhibit "B".

12. On the same date, GBA sent confirmation to CPMCA that "MCA has taken GBA's position for the 'seed money' " and sent a copy to MCA. A true and correct copy of that notification is attached hereto as Exhibit "C".

13. On or about the same date, GBA also cashed the $5,000 check further confirming its acceptance of MCA's

proposal. In or about the first few months of 1996, Jim Leahy, a member of GBA's Board of Directors, gave me copies of both the minutes of GBA's Board of Directors' meeting wherein the Board voted to accept the $5,000 of "seed money" from MCA and GBA's bank statement showing the deposit of the "seed money" check. Attached hereto as Exhibits "D" and "E", respectively, are true and correct copies of the Board minutes and GBA's check register.

14. Soon thereafter at a legislative conference in Sacramento that I attended, GBA's then Vice-President (Frank Park) independently confirmed the settlement (i.e. GBA's acceptance of MCA's offer) to me personally and expressed his satisfaction that the past problems between our respective associations had been resolved.

15. MCA relied in good faith on the existence of the MCA-GBA agreement by, inter alia: transferring certain fund contributions ($570.38) to GBA when GBA claimed to have provided services for the member even though the affected member (Metro Plumbing) had changed its affiliation to MCA as provided in the agreement, and by allowing Egan Plumbing (in 1995) to change associations from MCA to GBA even though MCA would not have done so in the absence of the MCA-GBA agreement. Attached hereto as Exhibit "F" is a true and correct copy of both Egan's request to transfer to GBA and the cover letter I wrote to Egan (with the request, executed by myself as approved on behalf of MCA, enclosed) explaining that I was agreeing to [p. 42] allow the switch because of GBA's acceptance of the terms of the January 7, 1994 proposal. While MCA generally allows its members to switch to other associations which have allowed their

members to switch to other associations (and/or have otherwise acted in good faith vis-vis MCA, because GBA's lack of good faith in the past MCA would not have allowed its members to switch to GBA in the absence of the MCA-GBA agreement (or some form of agreement that GBA would reciprocate and allow its members to change their association to MCA.)

16. I always intended and understood that the agreement which is at issue in this case applied to the collective bargaining agreements in force at the time the agreement was accepted by GBA. One of the main reasons I proposed that agreement was to resolve the dispute over entitlement to contract administration funds under the then current collective bargaining agreements (from Madlem Mechanical and Thermal Mechanical). At no time during the discussions or negotiations regarding the letter agreement did GBA, or anyone affiliated with GBA, ever state to me that their understanding of the agreement was that it would only apply to future collective bargaining agreements. Further, GBA first asked that the proposed agreement be modified or limited so that it only applied to future collective bargaining agreements after the present dispute had arisen.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on this 18th day of October, 1996, at Walnut Creek, California.

/s/ Scott W. Strawbridge
Scott Strawbridge

[p. 43] EXHIBIT A

MECHANICAL
CONTRACTORS
ASSOCIATION
OF NORTHERN
CALIFORNIA

940 Adams, Suite F
Benicia, CA 94510
(800) 640-5152
(707) 746-6484
FAX (707) 746-5384

[LOGO] [LOGO]

7 January 1994

Ron Peterson, President
GBA
c/o R. L. Peterson Company
P.O. Box 2267
Menlo Park, CA 94026

Dear Ron:

As a follow up to our December luncheon and subsequent phone calls, MCA would like to offer the following:

* MCA has attached a check for $5,000 made out to GBA.

* GBA may cash if the following is agreed to:

1) GBA writes CPMCA and relinquishes its claim to its "*seed money*" and informs CPMCA that MCA has taken GBA's position for "*seed money.*" It will then be up to MCA and CPMCA to work out details as to the disposition of that "*seed money.*"

2) The dispute between MCA and GBA is settled concerning the representation and employer trust funds of Madlem Mechanical and Thermal Mechanical.

3) Per our luncheon discussion, MCA would like to establish the following procedure to avoid any future such problems:

> It is agreed between MCA and GBA that no signatory contractors may switch Associations without notifying their respective Associations in writing and that switch (as far as employer trust funds) is made on next the anniversary date of the collective bargaining agreement; i.e., a signatory contractor from MCA who wishes to become signatory with GBA would notify MCA that he wishes to switch in writing. Currently the agreements in Local 467 and Local 393 have an anniversary date of July 1 each year. Hours starting on the next July 1 could be switched to the new Association.
>
> [p. 44] Ron I hope this settlement, without prejudice, is acceptable to GBA. We see it as a win-win situation.
>
> * GBA get its $5,000 seed money back immediately versus waiting for the March CPMCA Board Meeting and then the seed money may only be returned in progress payments.
>
> * The dispute between MCA and GBA is over.
>
> * A procedure for the future is established.

If the above settlement is acceptable, please have the GBA Board authorize you to initial this letter and the check can be cashed. If it is not acceptable, please return the check.

Thank you for your help and please feel free to contact me if you have any questions.

Sincerely,

/s/ Scott
Scott W. Strawbridge
Executive Vice President

SS:nw

Enclosure

cc: MCA Board
Jim Carter

R

[p. 45] EXHIBIT B

MECHANICAL
CONTRACTORS
ASSOCIATION
OF NORTHERN
CALIFORNIA

940 Adams, Suite F
Benicia, CA 94510
(800) 640-5152
(707) 746-6484
FAX (707) 746-5384

[LOGO] [LOGO]

7 January 1994

Ron Peterson, President
GBA
c/o R. L. Peterson Company
P.O. Box 2267
Menlo Park, CA 94026

Dear Ron:

As a follow up to our December luncheon and subsequent phone calls, MCA would like to offer the following:

* MCA has attached a check for $5,000 made out to GBA.

* GBA may cash if the following is agreed to:

1) GBA writes CPMCA and relinquishes its claim to its "*seed money*" and informs CPMCA that MCA has taken GBA's position for "*seed money*." It will then be up to MCA and CPMCA to work out details as to the disposition of that "*seed money*."

2) The dispute between MCA and GBA is settled concerning the representation and employer trust funds of Madlem Mechanical and Thermal Mechanical.

3) Per our luncheon discussion, MCA would like to establish the following procedure to avoid any future such problems:

> It is agreed between MCA and GBA that no signatory contractors may switch Associations without notifying their respective Associations in writing and that switch (as far as employer trust funds) is made on next the anniversary date of the collective bargaining agreement; i.e., a signatory contractor from MCA who wishes to become signatory with GBA would notify MCA that he wishes to switch in writing. Currently the agreements in Local 467 and Local 393 have an anniversary date of July 1 each year. Hours starting on the next July 1 could be switched to the new Association.
>
> [p. 46] Ron I hope this settlement, without prejudice, is acceptable to GBA. We see it as a win-win situation.
>
> * GBA get its $5,000 seed money back immediately versus waiting for the March CPMCA Board Meeting and then the seed money may only be returned in progress payments.
>
> * The dispute between MCA and GBA is over.
>
> * A procedure for the future is established.

If the above settlement is acceptable, please have the GBA Board authorize you to initial this letter and the check can be cashed. If it is not acceptable, please return the check.

Thank you for your help and please feel free to contact me if you have any questions.

Sincerely,

/s/ Scott
Scott W. Strawbridge
Executive Vice President

SS:nw

Enclosure

cc: MCA Board
Jim Carter

R

[p. 47] **EXHIBIT C**

[LOGO]
Greater Bay Area Association of
Plumbing and Mechanical Contractors, Inc.

2672 Bayshore Parkway – Suite 531
Mountain View, CA 94043
Telephone: (415) 965-0100 • Fax: (415) 965-0111

January 20, 1994
Elaine J. Rose
CPMCA
50 Fullerton Ct., Ste. 201
Sacramento, CA 95825

Dear Elaine:

GBA would like to relinquish our claim to the "seed money." MCA has taken GBA's position for the "seed money."

We wish you much good luck at CPMCA and look forward to seeing you at the Western Mechanical Conference in March, 1994.

Thank you for the invitation to re-join CPMCA should we once again change our minds.

Sincerely,

/s/ Norma
Norma Y. Singer
Executive Director

NYS:as

cc: Scott Strawbridge
MCA

[p. 48] Greater Bay Area Association of Plumbing and Mechanical Contractors Board of Directors Meeting Minutes

Tuesday, February 8, 1994
Mistral's
Redwood City

Present: Ron Peterson, Dave Barr, Frank Park, Claude Bergman, Rich DiMuzio, Jim Leahy, Tony Egan, Rube Sonstegard, Scott Denny, Steve Singewald, Russ Margiotta, Norma Singer.

Absent: Glen Bollenbacher

Minutes: **Motion** was made and passed to accept the minutes as mailed.

Financials:

Motion made and passed to accept the Financial Statement.

Motion made and passed to accept the income and expense statement.

Bills Presented for Payment – Motion was made and passed to pay Bills Presented for Payment.

Kidder, Peabody – Sandy Lanoie will be at the next Board Meeting to go over what we have in our account and what we would like to do.

S.J. Gallina & Co. put the year 1988 on the Financial Statement as the year an amendment was added to the By-Laws. If the Board wishes a correction, it will be made.

Correspondence:

Executive Director Report:

[p. 49] EXHIBIT D

Greater Bay Area Association
of
Plumbing and Mechanical Contractors
Board of Directors Meeting Minutes

Tuesday, January 11, 1994
GBA Office
Mt. View

Present: Ron Peterson, Dave Barr, Frank Park, Claude Bergman, Rich DiMuzio, Jim Leahy, Tony Egan, Norma Singer.

Absent: Rube Sonstegard, Glen Bollenbacher, Russ Margiotta, Scott Denny

Minutes: **Motion** was made and passed to accept the minutes as mailed.

Financials:

Motion made and passed to accept the Financial Statement.

Bills Presented for Payment – Motion was made and passed to pay Bills Presented for Payment.

Motion made and passed to accept the Budget as presented.

CLC will get back to Frank with how much they will be charging us.

Motion made and passed to cancel the picnic.

Motion made and passed to transfer $10,000 from Kidder, Peabody to Wells Fargo checking account.

Correspondence:

Letter from Rube thanking GBA for the donation to the Cancer Society and all the many cards that were sent to him.

[p. 50] **Executive Director Report:**

The Board accepted the Executive Directors report as presented.

Old Business:

Jim Leahy suggested we contact Carr, McClellan, Ingersoll, Thompson & Horn concerning changing Attorneys. Jim said the firm is very educated when it comes to the contractors. They are up on all the current laws. They are very efficient! They have a legal team that takes care of the construction end of what we do. Our last retainer for Harband was $2,500.

Motion made and passed to accept MCA's $5,000 check for the "seed money" that CPMCA owes us. If anyone wishes to change associations they can change on the anniversary date of each year.

Norma to fax MCA's letter to all members.

Motion made to accept all the even Board Members that are on the Board. Rube, Claude and Ron are the **only** even people, all the rest are odd. They will remain on the board for one more term.

Norma to check availability and approximate cost of the Plumbed Horse Restaurant in Saratoga for a Dinner Installation.

New Business:

Good of the Association:

Adjournment:

With no other business the meeting was adjourned.

Respectfully submitted,

/s/ Norma Y. Singer
Norma Y. Singer
Executive Director
January 21, 1994

[p. 51] The Board accepted the Executive Directors report as presented. It was requested that more detail be included concerning the phone conversations with the various people.

Old Business:

Peninsula Marine Office Park is the location which we are considering moving the office. Rube Sonstegard volunteered to do the negotiating concerning new office space.

Ron Peterson will send a letter to Scott Strawbridge with a point of clarification concerning switching the Associations.

Russ Margiotta thanked the Board for the flowers that were sent to him while he was in the hospital.

New Business:

Good of the Association:

Scott Denny stated that anyone wishing to be a member of IAPMO (wishing to join as an associate of this association) can join as a D1. It is cheaper to join as a D1 rather than a C1 (Contractor). You get the same benefits and it is half price ($30 rather than $60.)

Steve Singewald suggested we look toward someone to represent us on outside labor relations that charges a flat fee basis, not geared to revenue generated by hours worked. Steve said he would look into this for GBA.

Adjournment:

With no other business the meeting was adjourned.

Respectfully submitted,

/s/ Norma Y. Singer
Norma Y. Singer
Executive Director
February 24, 1994

[p. 52] EXHIBIT E

January 7, 1994 **Page:**

Check Register
From: 1/12/94 To: 2/7/94

Date	Num	Payee/ Memo	Cir	Amount	Balance
Illegible Illegible	1540	ANDREA SANCHEZ PERIOD ENDING 1-15-94	X	-370.33	198.67
Illegible	1541	NORMA Y. SINGER PERIOD ENDING 1-15-94	X	-1,037.35	-838.68
Illegible Deposit		DEPOSIT SEED MONEY FROM MCA	X	5,000.00	4,161.32
Illegible Deposit		DEPOSIT KIDDER, PEABODY	X	10,000.00	14,161.32
Illegible Deposit		DEPOSIT JOHNDROW, LEV./ ROUNTREE	X	960.00	15,121.32
Illegible Deposit		DEPOSIT PEN SP, MERSCH, SPE PRO, DITTMANN	X	1,920.00	17,041.32

Illegible Deposit		DEPOSIT ADVERTISING TRUST	X	2,000.00	19,041.32
Illegible Deposit		DEPOSIT SIGILLO, S&E, SPEC. PROD.		1,062.00	20,103.32
Illegible Deposit		DEPOSIT DALE, CAL-STEAM		1,005.00	21,108.32
1/31/94 Deposit		DEPOSIT FRANK PARK		51.27	21,159.59
2/1/94 Deposit		DEPOSIT NOVA MECHANICAL		51.27	21,210.86
2/1/94 Check	1547	STEPHEN CHELBAY FIDUCIARY INS.		-175.00	21,035.86
2/1/94 Check	1548	PITNEY BOWES POST. BY PHONE 2-16 THRU 5-15		-138.02	20,897.84
2/1/94 Check	1549	PACIFIC BELL JANUARY STATEMENT		-191.69	20,706.15

2/1/94 Check	1550	SHORELINE PARK OFFICE PLAZA FEBRUARY RENT	-560.00	20,146.15
2/1/94 Check	1551	VOID	.00	20,146.15
2/2/94	1552	PHCC	-594.00	19,552.15

[p. 53] *Egan Plumbing*

---

725 Industrial Rd. San Carlos, CA 94070 (415) 592-0472
FAX (415) 592-4768

May 16, 1995

Residential Plumbing & Mechanical Contractors
of Northern California
No. California MCA
1901 Olympic Blvd., Ste 200
Walnut Creek, Ca 94596
510-945-1288
Attn: Mr. Scott Strawbridge
Exec. Vice-President-MCA Assoc. of No. California

Dear Scott,

This letter is an official notification that EGAN PLUMBING wishes to resign from RPMC and/or and including (No. California MCA) and withdraws its bargaining rights from the association effective July 1, 1995.

It is my understanding that Egan Plumbing will not be bound by any future bargaining agreements by RPMC as a seperate entity or as part of the merged No. California MCA.

Please be further notified that Egan Plumbing wishes to transfer its bargaining rights to the Greater Bay Area Association effective July 1, 1995 and is in full understanding that the Hours starting on July 1, 1995 will be transfered to the new association. (GBA) SWS

The undersigned recognizes and agrees that he has been properly notified of the intentions of Egan Plumbing to switch associations, and that hours for Egan Plumbing will transfer to GBA Association beginning July 1, 1995.

Please indicate your acceptance by signing, dating and returning this letter to me within ten (10) days.

Sincerely,

/s/ Anthony J. Egan
Anthony J. Egan
Egan Plumbing

Accepted:

/s/ Scott W Strawbridge Date 5-17-95
Scott Strawbridge

[p. 54] **EXHIBIT F**

MCA NORTHERN CALIFORNIA MECHANICAL
CONTRACTORS ASSOCIATION

May 18, 1995

Anthony Egan
Egan Plumbing
725 Industrial Road
San Carlos, CA 94070

Dear Tony:

Thank you for your letter of May 16, 1995, concerning switching from RPMC to GBA.

Pursuant to my letter of January 7, 1994 (attached), which was signed off and approved by then GBA President Ron Peterson, I am signing your attached letter.

Good luck in GBA and I know you will be an outstanding GBA Board member.

Sincerely,
/s/ Scott
Scott W. Strawbridge
Executive Vice President

SS:nw

cc: Barbara Cunningham
Gary Saunders

[Letterhead Omitted In Printing]

[p. 55] **EXHIBIT 2**

[p. 56] JAMES A. CARTER (CBN 33119)
BRIAN M. CARTER (CBN 132710)
CARTER & CARTER
425 California Street, 19th Floor
San Francisco, CA 94104-2204
Telephone: (415) 989-4800

Attorneys for Plaintiff
MECHANICAL CONTRACTORS ASSOCIATION
OF NORTHERN CALIFORNIA

IN THE SUPERIOR COURT OF CALIFORNIA

FOR THE COUNTY OF SAN MATEO

MECHANICAL CONTRACTORS ASSOCIATION OF NORTHERN CALIFORNIA, a California corporation, Plaintiff, v. GREATER BAY AREA ASSOCIATION OF PLUMBING AND MECHANICAL CONTRACTORS, a California corporation, Defendant.	Case No. 394184 DECLARATION OF JAMES A. CARTER IN SUPPORT OF MOTION FOR SUMMARY ADJUDICATION

I, JAMES A CARTER, declare:

1. I am an attorney at law duly licensed to practice before all the courts of the State of California and am a partner in Carter & Carter, counsel for plaintiff herein.

2. In 1993, I represented plaintiff in connection with a dispute with defendant concerning the legal right and authority of contractors who were signatory to the Master Agreement between defendant GBA and U.A. Local Unions 393 and 467 to change their bargaining rights to plaintiff MCA and to thereby cause their contract administration and other employer funds to be directed to MCA rather than GBA. Two contractors, Thermal Mechanical and Madlem Mechanical, had been signatory to the GBA Master Agreement and wished to transfer to the MCA Master Agreement. I advised that said contractors had the authority to transfer with the consent of the Local Unions, even if GBA objected to said transfers. Legal counsel for GBA (Martin Harband) [p. 57] took an opposite view, and I engaged in correspondence with said legal counsel concerning our respective legal interpretations. True and correct copies of relevant portions of that correspondence are attached hereto as Exhibit "A".

3. Those letters demonstrate that the dispute between plaintiff and defendant concerned the then-current Collective Bargaining Agreements between GBA and Local Unions 393 and 467 and the authority of contractors bound by the GBA agreements to transfer to the MCA agreements. The "Letter Agreement" was intended to resolve the then current dispute (involving Madlem and Thermal) and to eliminate the threat of litigation between plaintiff and defendant concerning the contributions paid by Thermal and Madlem up to that time, as well as their future contributions paid by those contractors. Accordingly, the Letter Agreement, if it were to resolve that dispute, necessarily involved rights under the then-current Collective Bargaining Agreement. At no time in any

of the correspondence did counsel for GBA ever advise MCA that GBA would agree to application of the right to transfer in the future but would not agree to allow any contractors to transfer to MCA under the then-current Master Agreements.

4. Based upon the Letter Agreement, funds paid previously and paid thereafter by Thermal and Madlem were received by MCA without objection from GBA. It was only when other contractors attempted to transfer to MCA that GBA objected and thereafter took the position that the Letter Agreement applied only to future Collective Bargaining Agreements.

5. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on this 28th day of September, 1996, at San Francisco, California.

/s/ James A. Carter
James A. Carter

[p. 58] LAW OFFICES OF
GREENE, CHAUVEL & DESCALSO
A PROFESSIONAL CORPORATION

[Letterhead Omitted In Printing]

March 2, 1993

Plumbers and Steamfitters Local
Union 393
370 Umbarger Road
San Jose, CA 95111

RE: Master Labor Agreement Between
Local 393 and PHCC/GBA
Effective: 7/01/83
Expires: 6/30/95

We represent Plumbing, Heating and Cooling Contractors of the Greater Bay Area ("PHCC/GBA") for the Trustees of the PHCC/GBA Contract Administration Fund.

The Contract Administration Fund ("CAF") was established by the Master Agreement at Article XXVIII, commencing at Paragraph 181, with contributions from each Individual Contractor "for each hour worked by each of its employees upon work covered by the Agreement."

We are advised that CAF funds contributed by MADLEM PLUMBING COMPANY AND THERMAL MECHANICAL have been withheld ("frozen") by Local 393 and not remitted to PHCC/GBA. We require an accounting of such funds and their remittance before March 15, 1993.

Each Individual Contractor is bound to the Master Agreement until June 30, 1995. Membership in PHCC/GBA is not a precondition thereof. CAF funds cannot be withheld by either the Individual Contractor or Union Local 393. The Master Agreement is quite clear: contributions by Individual Contractors for the CAF must be paid to over to the fund.

[p. 59] Kindly indicate to us in advance whether the required accounting and remittance will be available by March 15, 1993. Thank you.

Very truly yours,

/s/ Martin E. Harband
MARTIN E. HARBAND

MEH: ps

[p. 60] HENDRICKSON HIGBIE & CARTER
ATTORNEYS AT LAW
425 CALIFORNIA STREET
NINETEENTH FLOOR
SAN FRANCISCO, CALIFORNIA 94104

[Letterhead Omitted In Printing]

April 16, 1993

Martin E. Harband
Green Chauvel & Descalso
901 Mariner's Island Blvd., Suite 400
San Mateo, California 94404-1594

Re: GBA – MCA – Local 393

Dear Mr. Harband:

I have received a copy of your letter of March 2, 1993, to UA Local 393, and I have been asked by MCA to give an opinion letter concerning the dispute between GBA and MCA.

I enclose herewith a copy of my letter to MCA dated April 16, 1993 for your review and analysis.

After you have reviewed this letter I request you give me a call in order that we may discuss a resolution of this dispute without further involvement of Local 393.

Very truly yours,

HENDRICKSON, HIGBIE
& CARTER

/s/ James A. Carter
James A. Carter

JAC/ea
Enclosure

cc: Robert Jesinger (w/encls.)
Attorney for Local 393

Scott Strawbridge

[p. 61] HENDRICKSON HIGBIE & CARTER
ATTORNEYS AT LAW
425 CALIFORNIA STREET
NINETEENTH FLOOR
SAN FRANCISCO, CALIFORNIA 94104

[Letterhead Omitted In Printing]

April 16, 1993

Scott Strawbridge
Mechanical Contractors Association
940 Adams, Suite F
Benicia, CA 94510

Re: UA Local 393
Right of Contractors to Change Bargaining Representative During Term of Collective Bargaining Agreement

Dear Scott:

You have advised me that a dispute has arisen concerning the legal authority of contractors who belong to an Employer Association ("GBA") to resign from that Association, designate MCA as the new bargaining representative, and thereafter to modify their collective bargaining agreements ("CBA") between said contractors and UA Local 393. The change would be a mid-term modification in order to designate MCA, rather than GBA, as the contractor's bargaining representative and recipient of funds provided in the CBA to be paid for purposes of contract administration.

It is my opinion that, in the absence of a provision in the CBA between GBA and Local 393 which prohibits the substitution of Employer bargaining representative during the term of said CBA, that the signatory employer and Local 393 are legally authorized to amend said CBA to designate a new bargaining representative and to authorize said representative to receive contract administration funds. Since there is no restriction in the CBA prohibiting designation of a different employer bargaining representative, and mid-term amendments are specifically authorized in Article XXIX.C, contractors previously represented by GBA may lawfully designate MCA and, effective as of acceptance of that designation by Local 393, said contract administration funds may be paid to MCA.

Although the precise legal basis on which GBA might object to such substitution of employer bargaining representative has not be articulated, we are in receipt of the letter from GBA's counsel dated March 2, 1993, in which it is asserted that the "Master Agreement" requires that contract administration funds be [p. 62] paid to GBA. However, said letter does address the right of modification.

Under any applicable law, whether Federal or California, the law is clear that parties to a contract providing benefits to a third party beneficiary may change, modify or rescind that contract unless the beneficiary has materially changed position in justifiable reliance on the contract before receiving notification of termination or recision. This principle is stated in *Karo v. San Diego Symphony Orchestra Ass'n*, 762 F.2d 819, 9th Cir. (1985), interpreting and applying California law to a question arising under a CBA. Moreover, the principle adopted in the *Karo* case was also supported by the Restatement of Contracts, so that legal principle is universal in the United States.

There could be no basis on which GBA could have materially changed its position in reliance on the continued CBAs between its members and Local 393, because GBA would have had no reasonable assurance that any of those contractors would continue to work in 393 jurisdiction, or that GBA would receive any guaranteed minimum income from those CBAs.

Based upon the foregoing analysis it is my opinion that no provision of law protecting third party beneficiaries of contracts would prohibit contractors previously represented by GBA from transferring that representation to MCA, amending the CBAs with Local 393, and thereafter causing contract administration funds to be paid to MCA.

GBA's attorney has not relied on its own by-laws as prohibiting such a transfer of bargaining rights, and there would be no meritorious basis for any such contention. There is no provision in the GBA By-laws prohibiting a member from transferring bargaining rights during the term of the CBA. The GBA By-Laws provide that a Member may resign under procedures set forth therein, which resignation shall be effective if the Member is not delinquent in dues and assessments. It is my understanding that the foregoing requirements have been satisfied by both Madlem and Therma, the two former GBA members who have transferred bargaining rights to MCA.

The GBA By-Laws in section 5.06 provide that, upon resignation of a Member, said Member agrees to "adhere to the terms and conditions of any and all contracts entered into on behalf of the members . . . including

. . . labor contracts or collectively bargained agreements. . . . "

[p. 63] Since the By-Laws are deemed to be a contract between the Member and the Association, the foregoing provision makes the Union a third party beneficiary of that contract. However, since the resigning Members will remain parties to a CBA with Local 393, and since Local 393 does not object to that change in bargaining representatives, its third party rights would not be affected by a modification to MCA's CBA.

Similarly, although the By-Laws require Members upon resigning to adhere to the terms of CBAs previously negotiated by GBA and Unions, that By-Law would not preclude a subsequent modification or amendment of the CBA by mutual agreement of the resigned Member and Union. In this field, Federal Law governs CBAs, but that law would look to California law, which provides quite clearly that:

> "A contract in writing may be modified by a contract in writing." (CC 1698(a)).

Thus, the By-Law provision would not preclude subsequent modification or amendment of the CBA by the resigned member and Local 393.

The only other potential argument which could be raised in objecting to a transfer of bargaining rights might assert a violation of the NLRA. GBA might contend that such conduct constituted an unfair labor practice since it would impact on a multi-employer bargaining unit ("M-E unit"). However, I have reviewed the law regarding multi-employer bargaining as developed by the NLRB and the Federal Courts, and I can find no case which would even arguably prohibit a member of such an M-E unit from transferring to a different M-E unit, with Union consent, during the term of a CBA. Moreover, the underlying rationale for the encouragement of M-E units would not be violated by the factual circumstances described above. M-E units are designed primarily to negotiate contracts, and both employers and unions are prohibited from conduct which would cause a break-up of such a M-E unit during the negotiating process. However, once the negotiating process has produced an agreement, there would appear to be no labor policy objective which would prohibit a contractor from transferring from one unit to another through a change in designated bargaining representatives. In fact, one of the principles of labor law is to encourage and protect freedom to designate a bargaining representative. Accordingly, any impediments which GBA might attempt to impose against such exercise of choice would appear to be counter to the underlying objectives of Federal Labor Law.

[p. 64] In summary, I do not believe GBA could institute meritorious proceedings either in court or before the NLRB in order to preclude contractors from transferring their bargaining rights from GBA to MCA. Under its bargaining authorization, in my opinion, MCA lawfully may ask Local 393 to modify its CBA and to permit

Contract Administration Funds from said contractors to be paid to MCA under its CBA with Local 393.

Very truly yours,

HENDRICKSON, HIGBIE
& CARTER

/s/ James A. Carter
James A. Carter

JAC/ea

[p. 65] LAW OFFICES OF
GREENE, CHAUVEL & DESCALSO
A PROFESSIONAL CORPORATION

[Letterhead Omitted In Printing]

August 5, 1993

Mechanical Contractors Association
of Northern California
940 Adams, Suite F
Benicia, CA 94510

Attention: Scott Strawbridge

RE: Master Labor Agreement between U.A. Local 393 and PHCC/GBA
Our Client: PHCC/GBA

Gentlemen:

We represent the Greater Bay Area Association of Plumbing and Mechanical Contractors, Inc., the successor organization to PHCC/GBA.

We understand that MCA has solicited and secured "signed authorizations" from Thermal Mechanical and Madlem Plumbing Company with respect to collective bargaining representation with U.A. Local 393. Further, that such authorizations have been delivered to Local 393 and United Administrative Services with the request that (i) MCA be recognized as each contractor's representative; and (ii) the Contract Administration Fund contributions from each contractor be paid over to MCA.

As you are well aware, both Thermal Mechanical and Madlem Plumbing Company are signatories to the Master Labor Agreement between PHCC/GBA and U.A. Local

393. The existing GBA authorization executed by each contractor acknowledges that:

> If the Individual Employer should withdraw this authorization, he will still be bound by all Collective Bargaining Agreements in force and effect with Local Unions.

[p. 66] We make no comment on the contractor's decision to join the MCA trade association. Trade association membership is separate and distinct from representation.

Notwithstanding, every contractor who is a party to the multi-employer agreement negotiated by PHCC/GBA and U.A. Local 393 is bound thereto until the expiration date of such agreement. Your continuing efforts to inveigle, entice and encourage contractors to sign MCA representation authorizations – with full knowledge that such contractors are bound to the existing multi-employer agreement negotiated by PHCC/GBA and Local 393 – is clear and unambiguous tortious conduct, commonly known as interference with contractual relations.

We have copies of correspondence between you and APMC of Sacramento which indicate your efforts in 1991 to secure representation authorizations from APMC members then-bound to their multi-employer agreement negotiated by AMPC and Local 447. Your present course of conduct is identical. Your motives and *modus operandi* are exemplified by the repetition of such conduct, and are equally egregious and unlawful.

You are admonished to desist from any further solicitation of GBA signatories, and to disclaim any MCA authorization from Thermal and Madlem which attempts to breach the multi-employer agreement between PHCC/GBA and U.A. Local 393. Our client has directed us to initiate litigation if you persist.

Very truly yours,

/s/ Martin E. Harband
MARTIN E. HARBAND

MEH:ps
cc: Thermal Mechanical
Madlem Plumbing

[p. 67] HENDRICKSON HIGBIE & CARTER
ATTORNEYS AT LAW
425 CALIFORNIA STREET
NINETEENTH FLOOR
SAN FRANCISCO, CALIFORNIA 94104

[Letterhead Omitted In Printing]

August 10, 1993

VIA FACSIMILE TRANSMITTAL

Martin E. Harband
Green Chauvel & Descalso
901 Mariner's Island Blvd., Suite 400
San Mateo, CA 94404-1594

Re: GBA – MCA – Local 393

Dear Mr. Harband:

Your letter of August 5, 1993 to Mechanical Contractors Association has been referred to the undersigned.

I will reply to your letter within the next ten days.

Very truly yours,

HENDERSON, HIGBIE
& CARTER

/s/ James A. Carter
James A. Carter

JAC/alm

cc: Scott Strawbridge

[p. 68] HENDRICKSON HIGBIE & CARTER
ATTORNEYS AT LAW
425 CALIFORNIA STREET
NINETEENTH FLOOR
SAN FRANCISCO, CALIFORNIA 94104

[Letterhead Omitted In Printing]

August 19, 1993

VIA FACSIMILE

Martin E. Harband, Esq.
Greene, Chauvel & Descalso
901 Mariner's Island Blvd., Suite 400
San Mateo, CA 94404-1594

Re: GBA – MCA – Local 393

Dear Mr. Harband:

In a letter dated August 10, I advised that I would reply to your letter of August fifth to MCA within ten days. I am not yet in a position to give you a definitive reply, but do wish to give you a preliminary response in order that you may engage in conduct, investigation and analysis in the most productive fashion.

1. You purport to "understand" that MCA has solicited members of GBA, and on that basis, assert that MCA has engaged in tortious interference with contractual relations. Specifically, you accuse MCA of such improper solicitation of Thermal Mechanical and Madlem Plumbing, and you forwarded a copy of your letter to each of these contractors.

2. Contrary to your assertions, I am advised by both Thermal and Madlem that they were not "solicited" by

MCA. Rather, each of them became completely dissatisfied with the services provided by GBA and determined that they wished to be represented by an association which could provide more effective representation in dealing with their signatory labor unions, including Local 393. Accordingly, each of those contractors specifically requested that MCA undertake their representation; they were not "solicited" by MCA. I am in the process of obtaining written confirmation of those facts from those two contractors, and will furnish you copies of their own letters which demonstrate that your factual premise is erroneous and that there has been no tortious interference with your client.

3. You and your client have been aware for some time that the reason Thermal and Madlem resigned from GBA and asked to be represented by MCA was because of dissatisfaction with GBA's services, and not because of improper solicitation. Nevertheless, you and your client have continued to demand that GBA receive Contract Administration Funds paid by former members who became so dissatisfied that they resigned their membership and asked that those funds be paid to an association which they believed provided more effective representation.

[p. 69] 4. Your entire course of action appears to be based on legally unsupported threats, rather than legal analysis asserting rights based upon existing facts. I am advised that you have threatened Local 393 with lawsuits, NLRB proceedings, and arbitration demands; you have threatened MCA with litigation based upon a factual premise which your client knows to be erroneous, and rather than await my promised response to your letter to MCA, by letter dated August 17, you threatened United Administrative Services even though its only "offense" was remitting funds paid by Madlem and Thermal as specifically requested by those two contractors and as approved by MCA and Local 393. Moreover, your letter to UAS dated August 17, quite aside from being totally lacking in factual or legal justification, also appears to implicitly threaten criminal charges, and may constitute unprofessional conduct in violation of Rule 5-100(A) of the California Rules of Professional Conduct.

I strongly urge you, and your client, to cease your program of threats and attempted intimidation pending a more detailed response from the undersigned. If your client rejects that sound advice, and directs you to institute litigation, I would then strongly urge you to advise your client as to its potential liability for malicious prosecution.

I expect to furnish you a detailed response to your letter to MCA not later than August 31, 1993. It is also my hope and expectation, prior to that time, to have carefully investigated contractual relationship between all parties and UAS, in order that I may comment on that relationship in the same letter.

Very truly yours,

HENDRICKSON, HIGBIE & CARTER

/s/ James A. Carter
James A. Carter

JAC/mq

cc: MCA
UAS
Madlem Plumbing
Thermal Mechanical
Robert Jesinger

[p. 70] **EXHIBIT 3**

[p. 71] JAMES A. CARTER (CBN 33119)
BRIAN M. CARTER (CBN 132710)
CARTER & CARTER
425 California Street, 19th Floor
San Francisco, CA 94104-2204
Telephone: (415) 989-4800
Facsimile: (415) 989-4864

Attorneys for Plaintiff
MECHANICAL CONTRACTORS ASSOCIATION
OF NORTHERN CALIFORNIA

IN THE SUPERIOR COURT OF CALIFORNIA

FOR THE COUNTY OF SAN MATEO

MECHANICAL CONTRACTORS ASSOCIATION OF NORTHERN CALIFORNIA, a California corporation, Plaintiff, v. GREATER BAY AREA ASSOCIATION OF PLUMBING AND MECHANICAL CONTRACTORS, a California corporation, Defendant.	Case No. 398184 DECLARATION OF BRIAN M. CARTER IN SUPPORT OF MOTION FOR SUMMARY ADJUDICATION

I, BRIAN M. CARTER, declare:

1. I am an attorney at law duly licensed to practice before all the courts of the State of California and am a partner in Carter & Carter, counsel for plaintiff herein.

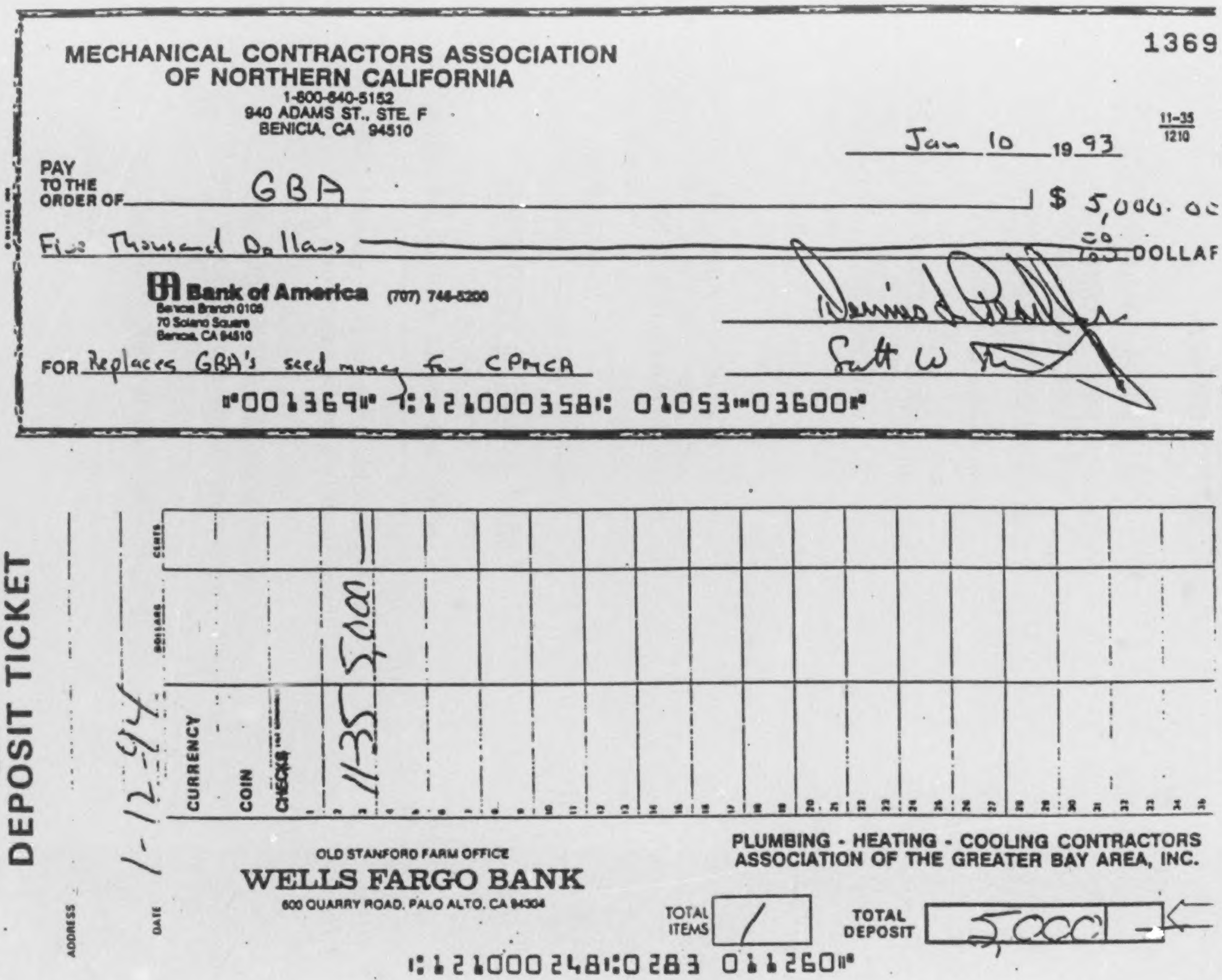
2. Attached hereto as Exhibit "A" is a true and correct copy of the check representing the $5,000 "seed money", produced by GBA in response to discovery requests and marked by defense counsel as document #D000056.

3. Attached hereto as Exhibit "B" is a true and correct copy of the relevant excerpts from the deposition of Frank Park, GBA's President.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on this 25st day of October, 1996, at San Francisco, California.

/s/ Brian M. Carter
Brian M. Carter

[p. 72] EXHIBIT A



MECHANICAL CONTRACTORS ASSOCIATION
OF NORTHERN CALIFORNIA
1-800-640-5152
940 ADAMS ST., STE. F
BENICIA, CA 94510

1369

11-35/1210

Jan 10 19 93

PAY TO THE ORDER OF GBA $ 5,000.00

Five Thousand Dollars 00/100 DOLLARS

Bank of America (707) 746-5200
Benicia Branch 0105
70 Solano Square
Benicia, CA 94510

FOR Replaces GBA's seed money for CPMCA

Scott W

⑈001369⑈ ⑆121000358⑆ 01053⑈03600⑈

DEPOSIT TICKET

ADDRESS

DATE 1-12-94

CURRENCY

COIN

CHECKS

1135 5,000 —

OLD STANFORD FARM OFFICE
WELLS FARGO BANK
600 QUARRY ROAD, PALO ALTO, CA 94304

PLUMBING - HEATING - COOLING CONTRACTORS
ASSOCIATION OF THE GREATER BAY AREA, INC.

TOTAL ITEMS 1

TOTAL DEPOSIT 5,000 —

⑆121000248⑆0283 011260⑈

[p. 73] **EXHIBIT B**

SUPERIOR COURT OF THE
STATE OF CALIFORNIA

COUNTY OF SAN MATEO

MECHANICAL CONTRACTORS
ASSOCIATION OF NORTHERN
CALIFORNIA, a CALIFORNIA
CORPORATION,

PLAINTIFF,

VS. No. 394184

GREATER BAY AREA ASSOCIATION
OF PLUMBING AND MECHANICAL
CONTRACTORS, a CALIFORNIA
CORPORATION,

DEFENDANT.

____________________________________/

DEPOSITION OF FRANK PARK

MAY 15, 1996

REPORTED BY: Kathryn Lloyd, CSR #5955

[p. 75] that January 1994 meeting, adopting resolutions that changed the resolutions adopted at that January 1994 meeting.

MR. CROLEY: I don't know if he can answer that question. You used the word "resolution" about three times.

MR. CARTER: Read it back please, Kathy.

(Record read.)

MR. CARTER: That is understandable.

(Record read.)

MR. CROLEY: I have an idea. Why don't you define what you mean by "resolution".

MR. CARTER: Q. As president of the association, you understand the board acts by adopting resolutions; don't you?

A. Right.

MR. CROLEY: Did the board ever subsequently act to change the minutes as reflected in Exhibit B? That seems to be what you are trying to ask.

MR. CARTER: Right.

THE WITNESS: No.

MR. CARTER: Q. Never did?

A. No.

Q. Did you learn at some point that MCA took the position that Exhibit A was an agreement between MCA [p. 74] and GBA?

A. I would say yes.

Q. After learning that MCA took the position that Exhibit A was an agreement, did the board ever act to terminate or change or repudiate what MCA believed was an agreement?

THE WITNESS: I need to talk.

MR. CROLEY: Can we take one minute?

MR. CARTER: Sure.

(Discussion off the record.)

THE WITNESS: In answer to your question, yes.

MR. CARTER: Q. And when did the board take that action?

A. We did it – basically, I took that action yesterday.

Q. Yesterday?

A. Yes.

Q. And you say you took the action as president?

A. As president.

Q. What action did you take?

A. I sent a certified letter to Mr. Strawbridge stating basically that if he is correct, that if it is an agreement, if it is an agreement, we hereby terminate.

[p. 76] **EXHIBIT 4**

[p. 77] JAMES A. CARTER (CBN 33119)
BRIAN M. CARTER (CBN 132710)
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425 California Street, 19th Floor
San Francisco, CA 94104-2204
Telephone: (415) 989-4800

Attorneys for Plaintiff
MECHANICAL CONTRACTORS ASSOCIATION
OF NORTHERN CALIFORNIA

IN THE SUPERIOR COURT OF CALIFORNIA
FOR THE COUNTY OF SAN MATEO

MECHANICAL CONTRACTORS ASSOCIATION OF NORTHERN CALIFORNIA, a California corporation, Plaintiff, v. GREATER BAY AREA ASSOCIATION OF PLUMBING AND MECHANICAL CONTRACTORS, a California corporation, Defendant.	Case No. 394184 DECLARATION OF GARY SAUNDERS

1. I am the Business Manager of U.A. Local 467, which has jurisdiction in San Mateo County, California.

2. I was a Business Agent during the period 1/80 to 12/87 and have been Business Manager since 1/1/88. At all times while acting as a Business Agent and Business

Manager I have been involved in negotiations with employers and employer associations. While acting as Business Manager I have been responsible for negotiating and administering labor agreements between Local 467 and employers and employer associations, including the Master Labor Agreement between Local 467 and Mechanical Contractors Association of Northern California ("MCA") and the Master Labor Agreement between Local 467 and Greater Bay Area [p. 78] Association of Plumbing and Mechanical Contractors ("GBA").

3. At all times while I have been Business Manager it has been the policy of this Local Union that: (A) If a contractor who is signatory to our Master Labor Agreement with either MCA or GBA wishes to transfer its designation of bargaining representative to the other association and become covered by the Master Labor Agreement of the transferee association, such a transfer will be accepted by Local 467 so long as it is specified in writing by the contractor and approved by both MCA and GBA; (B) It has never been the policy of this Union that we wish to negotiate or bargain regarding such a transfer of a signatory employer from one association to the other, nor has this Local Union ever stated that it would need to approve any such transfer in writing.

4. Officers and representatives of both MCA and GBA have been advised of the policy set forth in paragraph 3 above. Pursuant to that policy, Local 467 has accepted the transfers of signatory contractors from one association to the other.

5. It has also been understood and accepted by this Local Union that upon the transfer of an employer from

one Master Labor Agreement to another, that the employer's contract administration contributions as provided in the Master Labor Agreement are automatically assigned and, upon the effective date of said change, the contract administration funds commence being paid under the successor or transferee Master Labor Agreement to the association specified in that Agreement.

6. In 1995 I became aware that two contractors, Design Mechanical and R.L. Peterson, had executed documents indicating a desire to transfer their representation and coverage from GBA to MCA, and I was shown a letter dated January 7, 1994, which appeared to constitute an Agreement by GBA that said transfer would be accepted. However, I was thereafter advised by the officers of GBA that said letter did not constitute a binding agreement and that GBA had not agreed to any such transfer. Accordingly, based upon the policy described above, I advised the contract administrator, UAS, that it should continue paying contract administration funds on those two contractors to GBA since I had been advised by GBA that it had not agreed to the transfer of those contractors to MCA.

[p. 79] 7. If it is determined by a court that GBA had lawfully agreed with MCA that signatory employers covered by the GBA Master Labor Agreement could elect to transfer to the MCA Master Labor Agreement, then it would be the position of this Union that, as of the effective date of the contractors' attempt to change to the MCA Master Labor Agreement, contract administration funds thereafter paid by Design Mechanical and R.L. Peterson were properly payable to MCA, and it would be entitled to collect those funds from GBA since those funds were paid to GBA on my directions on the mistaken understanding that there was no legally binding agreement between GBA and MCA authorizing the transfer of said contractors and contract administration funds to MCA.

8. I have reviewed a letter on the letterhead of Roundtree Plumbing dated May 9, 1995, and in particular the phrase that: " . . . over the years when we were stalemated in negotiations with Local 467, the Union contended that if GBA did not agree, they could always get Scott Strawbridge to sign, . . . "

9. I have been an active participant in all negotiations between U.A. Local 467 and GBA since 1/1/80. While I was Business Manager I have never made a statement such as that quoted in paragraph 8 above, and while attending negotiations in my capacity as a Business Agent, I never heard the Business Manager make any such statement. Moreover, while I have been participating in negotiations, no representative of Local 467 having any authority to speak for said Local Union has ever made such a statement.

10. Said letter of May 9, 1995, also provides in part: " . . . It is Local 467's position that an agreement is an agreement until July 1998 and unless GBA releases the contractor, he will remain with GBA for the term of the agreement." I have made statements substantially as set forth in that quoted language. I believe the Local 467 policy as described in paragraph 3 above is consistent with that statement. The Master Labor Agreement between Local 467 and GBA does expire, by its terms, in July 1998, and I have stated the policy of this Union that

upon expiration a contractor may designate a new bargaining agent without the approval of the old bargaining agent. However, while a contractor is signatory to and bound by a Master Labor Agreement, the contractor may not be released from that Master Labor Agreement to become signatory to a new [p. 80] Master Labor Agreement without the agreement of both the old and new association. I believe that policy is effectively stated in the language quoted above.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and if called as a witness, I could and would competently testify thereto.

Executed on this 7th day of June, 1996, at Burlingame, California

/s/ Gary Saunders
Gary Saunders

[p. 81] **EXHIBIT 5**

[p. 82] JAMES A. CARTER (CBN 33119)
BRIAN M. CARTER (CBN 132710)
CARTER & CARTER
425 California Street, 19th Floor
San Francisco, CA 94104-2204
Telephone: (415) 989-4800

Attorneys for Plaintiff
MECHANICAL CONTRACTORS ASSOCIATION
OF NORTHERN CALIFORNIA

IN THE SUPERIOR COURT OF CALIFORNIA
FOR THE COUNTY OF SAN MATEO

MECHANICAL CONTRACTORS ASSOCIATION OF NORTHERN CALIFORNIA, a California corporation, Plaintiff, v. GREATER BAY AREA ASSOCIATION OF PLUMBING AND MECHANICAL CONTRACTORS, a California corporation, Defendant.	Case No. 394184 DECLARATION OF LOYD WILLIAMS IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY ADJUDICATION

I, LOYD WILLIAMS have personal knowledge of the following and if called as a witness could and would testify as follows:

1. I am the Business Manager of U.A. Local 393, which has jurisdiction in Santa Clara and San Benito Counties, California.

2. I have been Business Manager since March of 1992 and before that I had been a member of the Union Negotiating Committee since 1968. At all times while acting as Business Manager I have been involved in negotiations with employers and employer associations. While acting as Business Manager I have been responsible for negotiating and administering labor [p. 83] agreements between Local 393 and employers and employer associations, including the Master Labor Agreement between Local 393 and Mechanical Contractors Association of Northern California ("MCA") and the Master Labor Agreement between Local 393 and Greater Bay Area Association of Plumbing and Mechanical Contractors ("GBA").

3. At all times while I have been Business Manager it has been the policy of this Local Union that: (A) If a contractor who is signatory to our Master Labor Agreement with either MCA or GBA wishes to transfer its designation of bargaining representative to the other association and become covered by the Master Labor Agreement of the transferee association, such a transfer will be accepted by Local 393 so long as it is specified in writing by the contractor; (B) It has never been the policy of this Union that we wish to negotiate or bargain regarding such a transfer of a signatory employer from one association to the other, nor has this Local Union ever stated that it would need to approve any such transfer in writing. We have always agreed with this process because

the labor agreements are identical, except for the payee of the contract administration funds.

4. Officers and representatives of both MCA and GBA have been advised of the policy set forth in paragraph 3 above. Pursuant to that policy, Local 393 has accepted the transfers of signatory contractors from one association to the other.

5. It has also been understood and accepted by this Local Union that upon the transfer of an employer from one Master Labor Agreement to another, that the employer's contract administration contributions as provided in the Master Labor Agreement are automatically assigned and, upon the effective date of said change, the contract administration funds commence being paid under the successor or transferee Master Labor Agreement to the association specified in that Agreement.

6. In 1995 I became aware that two contractors, Design Mechanical and R.L. Peterson, had executed documents indicating a desire to transfer their representation and coverage from GBA to MCA, and I was shown a letter dated January 7, 1994, which appeared to constitute an Agreement by GBA that said transfer would be accepted. However, I was thereafter advised by the officers of GBA that said letter did not constitute a binding agreement and that GBA had not [p. 84] agreed to any such transfer.

7. If it is determined by a court that GBA had lawfully agreed with MCA that signatory employers covered by the GBA Master Labor Agreement could elect to transfer to the MCA Master Labor Agreement, then it would be the position of this Union that, as of the effective date

of the contractors' attempt to change to the MCA Master Labor Agreement, contract administration funds thereafter paid by Design Mechanical and R.L. Peterson (or any other contractor) were properly payable to MCA, and it would be entitled to reimbursement of any such funds thereafter paid to GBA on the mistaken legal understanding that there was no legally binding agreement between GBA and MCA authorizing the transfer of said contractors and contract administration funds to MCA.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and if called as a witness, I could and would competently testify thereto.

Executed on this 3 day of September, 1996, at San Jose, California.

/s/ Loyd Williams
Loyd Williams

[p. 85] PROOF OF SERVICE BY HAND DELIVERY (VIA MESSENGER)

I declare that:

I am employed in the City and County of San Francisco, California. I am over the age of eighteen (18) years, and not a party to the within entitled cause; my business address is: 425 California Street, 19th Floor, San Francisco, California 94104.

On October 28, 1995 I served the attached:

1. NOTICE OF MOTION AND MOTION FOR SUMMARY ADJUDICATION
2. MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY ADJUDICATION
3. SEPARATE STATEMENT OF ISSUES AS TO WHICH THERE IS NO SUBSTANTIAL CONTROVERSY, ASSOCIATED FACTS AND REFERENCE TO SUPPORTING EVIDENCE
4. DECLARATION OF JAMES A. CARTER IN SUPPORT OF MOTION FOR SUMMARY ADJUDICATION
5. DECLARATION OF LOYD WILLIAMS IN SUPPORT OF MOTION FOR SUMMARY ADJUDICATION
6. DECLARATION OF GARY SAUNDERS IN SUPPORT OF MOTION FOR SUMMARY ADJUDICATION
7. DECLARATION OF SCOTT STRAWBRIDGE IN SUPPORT OF MOTION FOR SUMMARY ADJUDICATION
8. DECLARATION OF BRIAN CARTER IN SUPPORT OF MOTION FOR SUMMARY ADJUDICATION

On the interested parties in the within action by personally delivering (via messenger) a true copy thereof at the following address:

Mr. Daniel Croley
Littler, Mendelsohn, et al.,
650 California Street, 20th Floor
San Francisco, CA 94108

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on October 28, 1996.

/s/ Brian M. Carter
Brian M. Carter

[p. 86] SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN MATEO

JUDGE DEPT. NO.
DEPUTY CLERK
[ILLEGIBLE]

CASE NO. 394184
COURT REPORTER

DATE 27 NOV 1996

TITLE OF ACTION:
MECHANICAL CONTRACTORS ASSOC OF NO CALIF., VS. GREATER BAY AREA ASSOCIATION OF PLUMBING AND MECHANICAL CONTRACTORS, ETC

NATURE OF EVENTS:
PLTF. MOTION FOR SUMMARY ADJUDICATION

______ ________________ APPEARANCES

______ ________________ APPEARANCES

___ OFF CALENDAR _____ MOVING PARTY'S REQUEST _____ NONAPPEARANCE _____ STIPULATE

✓ THE ABOVE MATTER IS CONTINUED ASSIGNED TO [ILLEGIBLE] .

___ SUBMITTED ON POINTS AND AUTHORITIES WITHOUT ARGUMENT.

___ MATTER ARGUED BY COUNSEL AND SUBMITTED.

___ MOTION GRANTED _____ MOTION DENIED

___ DEMURRER _____ SUSTAINED _____ DAYS TO AMEND.

_____ OVERRULED _____ DAYS TO ANSWER.

_____ GROUNDS _____

___ THE ABOVE MATTER IS TAKEN UNDER SUBMISSION.

___ POINTS AND AUTHORITIES TO BE SUBMITTED BY _____ NO

LATER THAN _____ AND BY _____ NO

LATER THAN _____

___ NOTICE OF RULING IS _____ WAIVED IN OPEN COURT.

___ ____

___ LET A WRITTEN ORDER BE PREPARED, SIGNED AND FILED.

DATE: 11/21/96

NATURE OF PROCEEDINGS: ____________________

LAW AND MOTION MINUTE FORM

[p. 87] SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN MATEO

JUDGE DEPT. NO. 8
DEPUTY CLERK Jennifer Illegible
Hon. Mark Illegible

CASE NO. 394184
COURT REPORTER Eric Throne

DATE 10 DEC 1996

TITLE OF ACTION:
MECHANICAL CONTRACTORS ASSOC OF NO CALIF., VS. GREATER BAY AREA ASSOCIATION OF PLUMBING AND MECHANICAL CONTRACTORS, ETC

NATURE OF EVENTS:

01.PLTF. MOTION FOR SUMMARY ADJUDICATION ___ (11-27)

02.DEFT. PLUMBING-HEARING-COOLING CONTRACTORS ASSOCIATION OF GREATER BAY AREA, INC'S CROSS-MOT FOR SUMMARY ADJUDICATION

_______ ________________ APPEARANCES

_______ ________________ APPEARANCES

___ OFF CALENDAR _____ MOVING PARTY'S REQUEST _X_ NONAPPEARANCE _____ STIPULATE

_X_ THE ABOVE MATTER IS CONTINUED/ ~~ASSIGNED~~ TO 1-7-97 at 9AM on L+M

___ SUBMITTED ON POINTS AND AUTHORITIES WITHOUT ARGUMENT.

___ MATTER ARGUED BY COUNSEL AND SUBMITTED.

___ MOTION GRANTED _____ MOTION DENIED

___ DEMURRER _____ SUSTAINED _____ DAYS TO AMEND.

_____ OVERRULED _____ DAYS TO ANSWER.

_____ GROUNDS _____

___ THE ABOVE MATTER IS TAKEN UNDER SUBMISSION.

___ POINTS AND AUTHORITIES TO BE SUBMITTED BY _____ NO

LATER THAN _____ AND BY _____ NO

LATER THAN _____

___ NOTICE OF RULING IS _____ WAIVED IN OPEN COURT.

_X_ tent. ruling adopted.
Pltf and Deft's motions are continued to 1-7-97. Re: Pltf's summary adjudication: PLTF TO FILE POS by 12.1. Deft to file and serve OPP. (if any) to Pltf's summary adjudication motion by 12-26-96. Reply, if any, by 12.30.

Re: Deft's cross-motion for summary adjudication: Deft to file & serve separate statement in compliance w/CCP and local court rules by 12-20-96; opposition separate statement to be file served by 12-27-96.

_X_ LET A WRITTEN ORDER BE PREPARED, SIGNED AND FILED.

DATE: 12-10-96

NATURE OF PROCEEDINGS: 394184

LAW AND MOTION MINUTE FORM

[p. 88] SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN MATEO

HONORABLE: ARAM SERVERIAN, JUDGE/
DATE: December 17, 1996

DEPT. NO.: 41
CLERK: M. WAGGENER
REPORTER: UNREPORTED

FILE NO.: 394184

(TITLE OF ACTION) (APPEARANCES)

MECHANICAL CONTRACTORS ASSOC., ETC.

VS

GREATER BAY AREA ASSOC., ETC.

NATURE OF PROCEEDINGS
SETTLEMENT CONFERENCE

The above matter dropped from calendar, stipulation and order signed and in the file resetting the trial and settlement conference date.

[p. 89] SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN MATEO

HONORABLE: HARLAN K. VEAL JUDGE
DATE: January 13, 1997
FILE NO: 394184

DEPT. NO.: 41 M. WAGGENER CLERK
UNREPORTED REPORTER

(TITLE OF ACTION) (APPEARANCES)

MECHANICAL CONTRACTORS ASSOC., ETC.

Plaintiff

vs.

GREATER BAY AREA ASSOC. OF PLUMBING, ETC.

Defendant

NATURE OF PROCEEDINGS
MINUTE ORDER VACATING SANCTIONS

Pursuant to letter dated Jan. 7, 1997 from James Carter, the Court hereby vacates its prior order imposing sanctions in the above entitled matter in the amount of $250.00.

[p. 90] CARTER & CARTER
ATTORNEYS AT LAW
425 CALIFORNIA STREET
NINETEENTH FLOOR
SAN FRANCISCO, CA 94104

[Letterhead Omitted In Printing]

January 7, 1997

The Honorable Harlan J. Veal
San Mateo Superior Court
401 Marshall Street
Redwood City, CA 94063

Re: MCA v. GBA – Case No. 394184 –
Motions for Summary Adjudication
Heard on January 7, 1997

Dear Judge Veal:

Your tentative ruling on the above matter ruled that plaintiff had failed to file a proof of service in accordance with Judge Forcum's earlier order, and sanctioned counsel for plaintiff the amount of $250 for failure to so file.

When we received Judge Forcum's order, we checked our files and determined that a proof of service had been filed on October 28, 1996. I also called Mr. Croley, counsel for GBA, to determine whether he had received all of plaintiff's moving papers. He verified that he had. Attached hereto is a copy of the endorsed filed Notice of Motion, and a copy of the Proof of Service executed by Brian M. Carter and filed with the court on that date. Having reviewed the file and determined that the Proof of Service had been duly filed, it was my belief that Judge Forcum did not have a copy of the Proof of Service in his files, but since a copy was in the Court file, I did not believe it necessary to file an additional Proof of Service.

It was for that reason that an additional Proof of Service was not filed.

In view of the fact that a Proof of Service had been duly filed, I would like to ask that you vacate the order imposing sanctions.

Respectfully submitted,

/s/ James A. Carter
James A. Carter

JAC:mq
Enclosure/Copy of Proof of Service

cc: Daniel A. Croley, Esq. (w/encs.)

Kim C me p/s 1/10/97
Tnx
Min. entry vacating sanctions + mail to
[illegible]

[p. 91] JAMES A. CARTER (CBN 33119)
BRIAN M. CARTER (CBN 132710)
CARTER & CARTER
425 California Street, 19th Floor
San Francisco, CA 94104-2204
Telephone: (415) 989-4800

Attorneys for Plaintiff
MECHANICAL CONTRACTORS ASSOCIATION
OF NORTHERN CALIFORNIA

IN THE SUPERIOR COURT OF CALIFORNIA

FOR THE COUNTY OF SAN MATEO

MECHANICAL CONTRACTORS ASSOCIATION OF NORTHERN CALIFORNIA, a California corporation, Plaintiff, v. GREATER BAY AREA ASSOCIATION OF PLUMBING AND MECHANICAL CONTRACTORS, a California corporation, Defendant.	Case No. 394184 NOTICE OF MOTION AND MOTION FOR SUMMARY ADJUDICATION; MEMORANDUM OF POINTS & AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY ADJUDICATION; SEPARATE STATEMENT OF ISSUES AS TO WHICH THERE IS NO SUBSTANTIAL CONTROVERSY, ASSOCIATED FACTS AND SUPPORTING EVIDENCE; DECLARATIONS OF LOYD WILLIAMS, GARY SAUNDERS, JAMES CARTER, SCOTT STRAWBRIDGE AND BRIAN CARTER IN SUPPORT OF MOTION Date: ~~11/25/96~~ 11/27/96 L.T. Time: 9 a.m. Dept.: LAW & MOTION

TO: Defendant GREATER BAY AREA ASSOCIATION OF PLUMBING AND MECHANICAL CONTRACTORS and LITTLER, MENDELSOHN ET AL, ITS ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT on November 25, 1996, at 9 a.m., or as soon thereafter

* * *

[p. 92] PROOF OF SERVICE
BY HAND DELIVERY (VIA MESSENGER)

I declare that:

I am employed in the City and County of San Francisco, California. I am over the age of eighteen (18) years, and not a party to the within entitled cause; my business address is: 425 California Street, 19th Floor, San Francisco, California 94104.

On October 28, 1995 I served the attached:

1. **NOTICE OF MOTION AND MOTION FOR SUMMARY ADJUDICATION**
2. **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY ADJUDICATION**
3. **SEPARATE STATEMENT OF ISSUES AS TO WHICH THERE IS NO SUBSTANTIAL CONTROVERSY, ASSOCIATED FACTS AND REFERENCE TO SUPPORTING EVIDENCE**
4. **DECLARATION OF JAMES A. CARTER IN SUPPORT OF MOTION FOR SUMMARY ADJUDICATION**
5. **DECLARATION OF LOYD WILLIAMS IN SUPPORT OF MOTION FOR SUMMARY ADJUDICATION**
6. **DECLARATION OF GARY SAUNDERS IN SUPPORT OF MOTION FOR SUMMARY ADJUDICATION**
7. **DECLARATION OF SCOTT STRAWBRIDGE IN SUPPORT OF MOTION FOR SUMMARY ADJUDICATION**
8. **DECLARATION OF BRIAN CARTER IN SUPPORT OF MOTION FOR SUMMARY ADJUDICATION**

On the interested parties in the within action by personally delivering (via messenger) a true copy thereof at the following address:

Mr. Daniel Croley
Littler, Mendelsohn et al
650 California Street, 20th Floor
San Francisco, CA 94108

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on October 28, 1996.

/s/ Brian M. Carter
Brian M. Carter

[p. 93] SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN MATEO

JUDGE DEPT. NO. 41
DEPUTY CLERK Donna Carter
Honorable Harlan K. Veal

CASE NO. 394184
COURT REPORTER
Pam Fisk

DATE 07 JAN 1997

TITLE OF ACTION: MECHANICAL CONTRACTORS ASSOC OF NO CALIF., VS. GREATER BAY AREA ASSOCIATION OF PLUMBING AND MECHANICAL CONTRACTORS, ETC

NATURE OF EVENTS: 01.DEFT. PLUMBING-HEARING-COOLING CONTRACTORS ASSOCIATION OF GREATER BAY AREA, INC'S CROSS-MOT FOR SUMMARY ADJUDICATION (12-10)

02.PLTF. MOTION FOR SUMMARY ADJUDICATION ___ (11-27) (12-10)

___None___ ______________ APPEARANCES

______________ ______________ APPEARANCES

__ OFF CALENDAR _____ MOVING PARTY'S REQUEST XX NONAPPEARANCE __STIPULATION

__ THE ABOVE MATTER IS CONTINUED/ASSIGNED TO _____

XX SUBMITTED ON POINTS AND AUTHORITIES WITHOUT ARGUMENT.

__ MATTER ARGUED BY COUNSEL AND SUBMITTED.

__ MOTION GRANTED _____ MOTION DENIED

__ DEMURRER __ SUSTAINED _____ DAYS TO AMEND.

__ OVERRULED _____ DAYS TO ANSWER.

__ GROUNDS ______________________________

__ THE ABOVE MATTER IS TAKEN UNDER SUBMISSION.

__ POINTS AND AUTHORITIES TO BE SUBMITTED BY _____ NO

LATER THAN _____ AND BY _____ NO

LATER THAN _____

__ NOTICE OF RULING IS _____ WAIVED IN OPEN COURT.

XX There being no appearances, the tentative ruling was adopted as the Order of the Court as follows:

Both Motions – Denied. Neither Moving Party has met its initial Burden of Proof per CCP § 437c.

No Proper Proof of Service of Plaintiff's Motion. Plaintiff's counsel sanctioned $250 pursuant to Local Court Rule 0.2 for non-compliance with Local Rule 0.8 contents of Proof of Service requirements, payable to the Superior Court by January 30, 1997.

Declaration of Scott Strawbridge filed in violation of Order of Judge Forcum not considered by the Court.

XX LET A WRITTEN ORDER BE PREPARED, SIGNED AND FILED.

DATE: January 7, 1997

NATURE OF PROCEEDINGS: Motions for Summary Adjudication

LAW AND MOTION MINUTE FORM

cc: James A. Carter, Esq.

[p. 94] **GEORGE J. TICHY, II CSB 941146**
DANIEL A. CROLEY, CSB 154386
LITTLER, MENDELSON, FASTIFF,
TICHY & MATHIASON
A Professional Corporation
650 California Street, 20th Floor
San Francisco, California 94108-2693
Telephone: (415) 433-1940

Attorneys for Defendant
PLUMBING-HEATING-COOLING
CONTRACTORS ASSOCIATION OF
GREATER BAY AREA, INC.

IN THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN MATEO

MECHANICAL CONTRACTORS ASSOCIATION OF NORTHERN CALIFORNIA, a California Corporation, Plaintiff, v. **GREATER BAY AREA ASSOCIATION OF PLUMBING AND MECHANICAL CONTRACTORS, a California corporation,** Defendant.	**Case No. 394184** **STIPULATION AND ORDER TO FILE SECOND AMENDED ANSWER** (Filed Feb. 10, 1997)

[p. 95] IN THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN MATEO

MECHANICAL CONTRACTORS ASSOCIATION OF NORTHERN CALIFORNIA, a CALIFORNIA CORPORATION, Plaintiff, v. **GREATER BAY AREA ASSOCIATION OF PLUMBING AND MECHANICAL CONTRACTORS, a CALIFORNIA CORPORATION,** Defendant.	**Case No. 394184** **STIPULATION AND ORDER TO FILE SECOND AMENDED ANSWER**

Plaintiff Mechanical Contractors Association's ("Plaintiff" or "MCA") and Defendant Plumbing-Heating-Cooling Contractors Association of the Greater Bay Area, Inc.'s ("Defendant" or "GBA") stipulate as follows:

[p. 96] 1. GBA will file and serve upon MCA's counsel by mail the SECOND AMENDED ANSWER TO UNVERIFIED COMPLAINT, a copy of which is attached as Exhibit A.

MECHANICAL CONTRACTORS
ASSOCIATION OF NORTHERN
CALIFORNIA

DATED: January 30, 1997

BY: /s/ James Carter
JAMES CARTER

of CARTER AND CARTER

GREATER BAY AREA
ASSOCIATION OF PLUMBING
AND MECHANICAL
CONTRACTORS

DATED: January 30, 1997

BY: /s/ Daniel A. Croley
DANIEL A. CROLEY

of LITTLER, MENDELSON,
FASTIFF, TICHY &
MATHIASON
A Professional Corporation

IT IS SO ORDERED based on the parties above-referenced Stipulation.

DATED: 2-10-97

/s/ Illegible
JUDGE OF THE SUPERIOR
COURT

[p. 97] EXHIBIT A

[p. 98] **GEORGE J. TICHY, II CSB, 941146**
DANIEL A. CROLEY, CSB 154386
LITTLER, MENDELSON, FASTIFF,
TICHY & MATHIASON
A Professional Corporation
650 California Street, 20th Floor
San Francisco, California 94108-2693
Telephone: (415) 433-1940

Attorneys for Defendant
PLUMBING-HEATING-COOLING
CONTRACTORS ASSOCIATION OF
GREATER BAY AREA, INC.

IN THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN MATEO

MECHANICAL CONTRACTORS ASSOCIATION OF NORTHERN CALIFORNIA, a CALIFORNIA CORPORATION,

Plaintiff,

v.

GREATER BAY AREA ASSOCIATION OF PLUMBING AND MECHANICAL CONTRACTORS, a CALIFORNIA CORPORATION,

Defendant.

Case No. 394184

DEFENDANT PLUMBING-HEATING-COOLING CONTRACTORS ASSOCIATION OF GREATER BAY AREA, INC. SECOND AMENDED ANSWER TO UNVERIFIED COMPLAINT

[p. 99] Defendant Plumbing-Heating-Cooling Contractors Association Of Greater Bay Area, Inc. ("Defendant") answers the unverified Complaint of Mechanical Contractors Association of Northern California ("Plaintiff") as follows:

I

GENERAL DENIAL

1. Defendant generally denies each and every allegation of Plaintiff's unverified Complaint.

II

AFFIRMATIVE DEFENSES

As separate and distinct affirmative defenses to Plaintiff's Complaint, and alleged causes of action, and each of them, Defendant alleges as follows:

FIRST AFFIRMATIVE DEFENSE

1. Plaintiff's Complaint and alleged causes of action, and each of them, fail to state facts sufficient to constitute a cause of action against Defendant.

SECOND AFFIRMATIVE DEFENSE

2. Plaintiff's claims are preempted in whole or in part by the National Labor Relations Act (the "NLRA"), including without limitation, section 8(d) of the NLRA. 29 U.S.C. § 141, *et seq*.

THIRD AFFIRMATIVE DEFENSE

3. Plaintiff's Complaint and causes of action, and each of them, alleges an agreement which is unlawful under the NLRA, including without limitation, section 8(d) of the NLRA; thus, the agreement is void under Civil Code sections 1608 and 1667. 29 U.S.C. § 141, *et seq.*

FOURTH AFFIRMATIVE DEFENSE

4. Plaintiff's Complaint and causes of action, and each of them, are barred by, or the relief Plaintiff seeks is unavailable under, the principle of Mistake of Fact.

[p. 100] FIFTH AFFIRMATIVE DEFENSE

5. Defendant is informed and believes and thereon alleges that Plaintiff has failed to avoid or minimize any and all damages which are alleged to have been caused by Defendant, and Defendant's liability to Plaintiff, if any, should be denied or reduced accordingly.

SIXTH AFFIRMATIVE DEFENSE

6. Plaintiff's Complaint and causes of action, and each of them, are barred, or the relief Plaintiff seeks is unavailable, in whole or in part by Plaintiff's fraudulent misrepresentations and/or omissions.

SEVENTH AFFIRMATIVE DEFENSE

7. Plaintiff's Complaint and causes of action, and each of them are barred by, or the relief which Plaintiff seeks is unavailable under, the doctrine of estoppel.

EIGHTH AFFIRMATIVE DEFENSE

8. Plaintiff's Complaint and causes of action, and each of them, are bared or excused by Plaintiff's failure of performance.

NINTH AFFIRMATIVE DEFENSE

9. Plaintiff's Complaint and alleged causes of action and each of them, fail to state a claim against Defendant because Local 393 and/or Local 467 are not parties to the agreement(s) and/or contract modification(s) alleged and/or because any acquiescence by them to the agreement(s) and/or modification(s) alleged is not in writing.

TENTH AFFIRMATIVE DEFENSE

10. Plaintiff's Complaint and causes of action, and each of them, fail against Defendant because the agreement(s) alleged was not authorized or ratified in whole or in part by Defendant.

ELEVENTH AFFIRMATIVE DEFENSE

11. Plaintiff's Complaint and causes of action, and each of them, fail against Defendant because the agreement(s) alleged is not supported in whole or in part by adequate consideration.

[p. 101] TWELFTH AFFIRMATIVE DEFENSE

12. Plaintiff's Complaint and causes of action, and each of them, fail against Defendant because the alleged entry into the alleged agreement(s) is an ultra vires act.

THIRTEENTH AFFIRMATIVE DEFENSE

13. From approximately September 1992, and continuing to the present, Plaintiff has been indebted to Defendant in an amount to be determined at trial. This indebtedness arose by virtue of contract administration funds which were due to Defendant but were paid to Plaintiff. This whole amount is unpaid and now due and, together with interest thereon at the applicable rate, must be set off against any amount awarded to Plaintiff in this action under California Code of Civil Code of Civil Procedure section 431.70 and/or any equitable right of recoupment and/or set off.

FOURTEENTH AFFIRMATIVE DEFENSE

14. Plaintiff's Complaint and causes of action, and each of them, are preempted, in whole or in part, by the Labor Management Relations Act and/or by federal common law applicable to collective bargaining agreements. 29 U.S.C. § 185, *et seq.*

WHEREFORE, Defendant prays for judgment as follows:

1. That Plaintiff take nothing by its Complaint.

2. For its costs incurred herein.

3. That the amount of Defendant's claim against Plaintiff, together with interest at the applicable rate, be set off against any amount awarded to Plaintiff in this action.

[p. 102] 4. For such other and further relief as the Court may deem just and proper.

Dated: January 30, 1997

LITTLER, MENDELSON, FASTIFF,
TICHY & MATHIASON
A Professional Corporation
GEORGE J. TICHY, II
DANIEL A. CROLEY

By: /s/ Daniel A. Croley
DANIEL A CROLEY

Attorneys For Defendant
GREATER BAY AREA
ASSOCIATION
OF PLUMBING AND
MECHANICAL
CONTRACTORS

[p. 103] SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN MATEO

HONORABLE: JOHN G. SCHWARTZ, JUDGE
DATE: FEBRUARY 28, 1997
FILE NO.: 394184

DEPT. NO: 18 CLERK: LENA CASTRO
REPORTER: UNREPORTED

(TITLE OF ACTION)	(APPEARANCES)
MECHANICAL CONTRACTORS ASSOC OF NO CALIF. Plaintiff	JAMES A. CARTER, for Plaintiff
vs.	
GREATER BAY AREA ASSOCIATION OF PLUMBING AND MECHANICAL CONTRACTORS, ETC Defendant	DAN CROWLEY, for Defendant

NATURE OF PROCEEDINGS
MANDATORY SETTLEMENT CONFERENCE

UNREPORTED Conference held in chambers with Court and counsel stated above. Matter did not settle.

[p. 104] SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN MATEO

HONORABLE: ARAM SERVERIAN, JUDGE
DATE: March 17, 1997
FILE NO.: 394184

DEPT. NO: 3 CLERK: RUTH DeMOSS
REPORTER: UNREPORTED

(TITLE OF ACTION)	(APPEARANCES)
MECHANICAL CONTRACTORS ASSOCIATION OF NORTHER CALIFORNIA	James A. Carter for pltf.
VS	
GREATER BAY AREA ASSOCIATION OF PLUMBING AND MECHANICAL CONTRACTORS, ETC	Daniel A. Croley for deft.

NATURE OF PROCEEDINGS
SETTLEMENT CONFERENCE – Day of Trial

Unreported conference held in chambers with Court and above named counsel.

Case did not settle and remains set for trial.

Case is returned to the Department of the Presiding Judge, Department 8, for assignment for trial.

[p. 105] SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN MATEO

HONORABLE: JUDITH W. KOZLOSKI JUDGE
DATE: March 17, 1997
FILE NO.: 394184

DEPT. NO: 10 FITZGIBBON CLERK
UNREPORTED REPORTER

(TITLE OF ACTION)	(APPEARANCES)
MECHANICAL CONTRACTORS ASSOCIATION OF NORTHERN CALIFORNIA Plaintiff	JAMES CARTER FOR PLAINTIFF
vs.	
GREATER BAY AREA ASSOCIATION OF PLUMBING AND MECHANICAL CONTRACTORS, Defendant	DANIEL A. CROLEY PRES. FOR DEFT.

NATURE OF PROCEEDINGS COURT TRIAL DAY -1

COUNSEL FOR RESPECTIVE PARTIES FILED THEIR DOCUMENTS WITH THE COURT CLERK AS FOLLOWS:

DEFENDANT'S MOTION IN LIMINE. COUNSEL DIRECTED TO RETURN ON 3/18/97 AT 9:00 A.M. FOR FURTHER COURT TRIAL